TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 214.

ARCHIE BURRELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF MONTANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED SEPTEMBER 24, 1900.

(13,955.)

(18,835.)

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1 Caption.

In the Supreme Court of the State of Montana.

THE STATE OF MONTANA, Plaintiff and Respondent,
v.
ARCHIE BURRELL, Defendant and Appellant.

2 *Information.*

In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

THE STATE OF MONTANA, Plaintiff,
vs.
ARCHIE BURRELL, Defendant.

At the term of the district court of the eighth judicial district of the State of Montana, in and for the county of Cascade, begun and holden at Great Falls, the county seat of said county, A. C. Gormley county attorney of said county of Cascade, now here in court, upon leave granted by this honorable court, and after an order duly made by W. H. Safford, a justice of the peace in and for the county of Cascade and State of Montana, requiring the defendant to appear before the said district court, and answer the charge herein made, information makes that Archie Burrell late of the county of Cascade, on the 20th day of March, A. D. 1901, at the county of Cascade, in the State of Montana, did commit the crime of obtaining
3 money by false pretenses, as follows, to wit: The said Archie Burrell did, on the 20th day of March A. D. 1901, in said county of Cascade and State of Montana, with force and arms, knowingly, designedly, fraudulently, unlawfully, falsely and feloniously pretend and represent to the Royal Milling Company, a corporation organized and existing under the laws of the State of Minnesota, and doing business in the city of Great Falls, in said Cascade county and State of Montana, that a certain statement in writing which he, the said Archie Burrell, then and there had, and produced, was a true and correct statement of his assets and liabilities at said time, a true copy of which statement so produced is as follows: to wit:

"GREAT FALLS, MONT., *Jan.* 1, 1901.

State of Archie Burrell'- business.

CR.

Jan. 1.	Inventory	8,376.15
"	Fixtures, wagons & horses, etc	1,803.60
"	Insurance paid	78.00
"	Bills receivable	6,470.98
		$16,728.73
"	Cash on hand	162.40
		$16,891.13

DR.

Jan. 1.	Bills payable	6,914.76
	By balance	$9,976.37

ARCHIE BURRELL."

That said statement was false in this: that the said Burrell, therein stated that his bills payable amounted to the sum of $6,914.76, which statement was false and was by said Burrell known to be false, and that said Burrell was then, and for a long time prior thereto, including January 1, 1901, aforesaid, and ever since has been, indebted to various persons in various sums aggregating more than $14,000, and that at said time said Burrell well knew that he was indebted in a sum exceeding $14,000, but falsely and fraudulently concealed his knowledge thereof; that said Royal Milling Company, believing that said false and fraudulent statement was true, and relying upon the truth of the same, and without any knowledge that the same was not true, did, between the 20th day of March, 1901, and the 20th day of July, 1901, sell and deliver to the said Archie Burrell, goods, wares and merchandise, consisting of flour, cereals and grain, the property of said Royal Milling Company, of the value of $1197.00 and extend credit to said Archie Burrell therefor, for which the said Archie Burrell has not paid, and that the said Royal Milling Company was induced to so sell and deliver said goods, wares and merchandise, and extend credit to said Archie Burrell, by reason of said false and fraudulent pretenses, and by reason of said false and fraudulent statement, and that said false and fraudulent pretenses were so made by the said Archie Burrell for the purpose and with the design of obtaining said goods and merchandise from the said Royal Milling Company and with the purpose and design of defrauding said Royal Milling Company of the same, and that by reason of said false and fraudulent pretenses he did defraud said Royal Milling Company of said goods and merchandise, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the State of Montana.

A. C. GORMLEY,
County Attorney, Cascade County, State of Montana.

STATE OF MONTANA, }
County of Cascade, } ss:

A. C. Gormley, being first duly sworn, says that he said affiant, is the county attorney of Cascade county, Montana, and on information and belief says that the facts stated in the foregoing information are true, and that the defendant therein named is guilty of the offense charged as therein set forth.

A. C. GORMLEY.

6 Subscribed and sworn to before me on this 24th day of September, 1901.

G. B. LOCKHART,
Deputy Clerk Dist. Court.

(Endorsed on back:) 234 (Title of court and title of cause.) Information for obtaining property by false pretenses. Witnesses. William M. Atkinson, William A. Appel, Henry A. Burrell, David Craig, F. C. Lampen, Henry Welch, Gold T. Curtis, H. H. Matteson, Henry Burrell, A. R. Mettler, Charles E. Heisey, S. A. Balliet. Filed in open court this 24th day of September A. D. 1901. John T. Athey, clerk. G. B. Lockhart, deputy clerk. A. C. Gormley, county attorney, Cascade county, Montana.

7 Title of Court.

Title of Cause.

Verdict.

We, the jury, in the above entitled prosecution, find the defendant guilty as charged in the information, and fix his punishment at one year in the State prison.

V. W. MULLERY,
Foreman of the Jury.

Endorsed: 234 (Title) Verdict. Filed Oct. 9th, 1901. John T. Athey, clerk.

8 *Motion in Arrest of Judgment.*

Title of Court.

Title of Cause.

Comes now the defendant, Archie Burrell, in the above-entitled ation, by and through his attorney, J. A. Largent, on this 12th day of October, 1901, and now after verdict of guilty has been pronounced in the above entitled action against Archie Burrell, the defendant therein, and before judgment, comes the defendant in the above entitled action, by J. A. Largent, his attorney, and moves the court to arrest the judgment in this action, and that judgment in said cause be arrested, and that he be discharged and allowed to go without day, for the following reasons:

1. That the information filed herein does not state facts sufficient to constitute a crime under the laws of the State of Montana;

2. That the information does not purport to be made and found according to law;

3. That the court has no jurisdiction to pronounce judgment for the reason that said Archie Burrel was charged in said information with having obtained property or goods from the Royal Milling Company under false pretenses and through false representa-

9 tions, and that there is no evidence that the Royal Milling Company is a person under the law, or that said Royal Mill-

ing Company was a person defrauded within the jurisdiction of this court;

4. That the verdict found by the jury was not based upon the evidence presented in this case, but that the verdict was influenced by evidence that was placed in the hands of the jury by T. P. Green, court bailiff, without order or consent of this court.

Wherefore, and for the reasons apparent in the record, the defendant prays that said judgment be arrested.

J. A. LARGENT,
Attorney for Defendant.

Personal service of the foregoing motion for arrest of judgment, and affidavits on motion for arrest of judgment is hereby admitted this 11th day of Oct., 1901.

A. C. GORMLEY,
County Attorney.

T- A. C. Gormley, county attorney, Cascade county, Montana:

Please take notice that upon the information herein, on the evidence taken at the trial of this action, on the annexed affidavits, and upon all other proceedings heretofore had in this case, I will move the court, at 9:30 o'clock a. m. on the 12th day of October, 1901, at the court room in the court house in the city of Great Falls, Cascade county, Montana, for an order arresting judgment against said defendant, and for such other relief as may be just.

J. A. LARGENT,
Attorney for Defendant.

Dated Great Falls, Montana, this 11th day of October, 1901.

(*Affidavit.*)

Title of Court.

Title of Cause.

STATE OF MONTANA, }
County of Cascade, } *ss:*

Archie Burrel, being first duly sworn, says:

That he resides in the city of Great Falls, county of Cascade, State of Montana; that he is the defendant in the above entitled action; that as such defendant he was tried on an information charging him with obtaining property under false pretenses before this court and a jury on the 9th day of October, 1901, and was found guilty by such jury as charged on the same day; deponent further says that he believes said information does not conform to the requirements of the penal code of the State of Montana in the following particulars: That said information does not purport to be authorized by law or by an order of this court, and that said information shows that the party claimed to have been defrauded, the Royal Milling Company, is a corporation organized and existing under the laws of the State

of Minnesota, and the information does not show that said corporation was defrauded within the jurisdiction of this court. And deponent further says that after said case was tried and submitted to the jury, a paper, marked for identification as "Ex. F," was taken
12 to the jury room and delivered to the jury in said action by T. P. Green, court bailiff, without order or consent of the said court or any of the attorneys to said action, and contrary to the wishes and consent of this deponent; that said "Ex. F" having not been offered in evidence and was not evidence in said case, was considered by said jury in rendering their said verdict. And deponent further says that said information charges this deponent and defendant with having obtained goods from the Royal Milling Company, a corporation created under the laws of the State of Minnesota, under false pretense and through false representations, and that there is no evidence in said case showing or proving who said Royal Milling Company is or was, or identifying said Royal Milling Company, and there is no evidence showing that such person exists or was defrauded in the jurisdiction of this court; and deponent is informed and believes that this court has no jurisdiction to pronounce judgment upon this deponent and defendant under the verdict found by said jury, which said verdict was based upon the evidence in said cause, and there being absolutely no evidence identifying who the person Royal Milling Company is or was.

ARCHIE BURRELL.

Subscribed and sworn to before me this 11th day of October, 1901.

JOHN A. LARGENT, [NOTARIAL SEAL.]
Notary Public in and for Cascade County, Montana.

13 (*Affidavit.*)

Title of Court.

Title of Cause.

STATE OF MONTANA, }
County of Cascade, } *ss:*

J. A. Largent, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant in the above entitled action; that as such attorney he appeared for the defendant and tried said case in said court on behalf of the defendant; that in the trial of the said case he verily believes no evidence was submitted to this court to prove or show to this court who the Royal Milling Company, named in the information, was or is, or any evidence that would tend to identify or prove the person Royal Milling Company; and that he believes no evidence being submitted to prove any person such as the Royal Milling Company was in existence, there is no person identified or proven by which this defendant in the information is charged with having obtained property from through false representations or under false pretenses. Affiant further says that he is informed by T. P. Green, court bailiff in the

above named court, that after the court had instructed the jury herein, and prior to the verdict rendered, and after the court
14 had adjourned and left the court room, that he found a paper upon the desk of the court marked "Ex. F," and that he took said paper and delivered it into the hands of the jury; and affiant says that he believes that said paper was not offered and received in evidence in this case, and that he is informed and believes that the jury were influenced in rendering their verdict of guilty by reason of said "Ex. F," or paper aforesaid.

J. A. LARGENT.

Subscribed and sworn to before me this 11th day of October, 1901.

GEO. H. STANTON,
Notary Public in and for Cascade County, Montana.

Endorsed: (Title of court; title of cause.) Motion in arrest of judgment. J. A. Largent, attorney for defendant. Great Falls, Montana. Filed: October 12th, 1901. John T. Athey, clerk; by G. B. Lockhart, deputy.

15 *Notice of Intention to Move for a New Trial.*

Title of Court.

Title of Cause.

Notice of intention to move for new trial.

To Mr. A. C. Gormley, attorney for plaintiff, and to John T. Athey, clerk of said court:

You will please take notice that the defendant Archie Burrell, intends to move and will move the court to vacate and set aside the verdict and all decisions of the court rendered in the above cause, and to grant a new trial in said cause, upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial, in this: That the court permitted W. G. Downing to appear as counsel for the State without any order of the court being made therefor, and without any order or request by the county commissioners of Cascade county, Montana, for said Downing to appear as counsel for the State, and said Downing appeared for and on behalf of the Royal Milling Company, and was paid therefor by the said company, in which William M. Atkinson, managing agent of the said company, was the principal witness.

16 2. Abuse of discretion by the court by which defendant was prevented from having a fair trial in this:

That the said court permitted William M. Atkinson, the managing agent of the Royal Milling Company, to testify on rebuttal by the State after said Atkinson had remained in the court room during the examination of all the witnesses for the defense, and after an order had been made and entered by the court at the beginning of

the trial that all witnesses in said cause should be excluded from the court room and not be allowed to enter the court room until they were called as such witnesses, and should remain outside of the court room until their evidence was entirely finished.

3. Errors of law occurring at the trial, in this, to-wit:

The court erred in overruling defendant's objection to the introduction of Exhib. A, as appears on page 4 of the transcript of the evidence herein, which objection is as follows: Defendant objects to Exhib. A being offered in evidence on the ground that the statement does not purport to be a statement rendered on the 20th day of March 1901, and the statement itself shows that it is a statement of business of January 1st, 1901, on the ground that it is immaterial, irrelevant and not competent.

The court erred in sustaining the State's objection to the
17 question propounded to witness Atkinson, as appears on page 11 of the transcript of evidence herein, as follows:

Q. "Then, as I understand it, Mr. Atkinson, you have shouldered the responsibility of all credits that have been extended in the city of Great Falls for the eight years you have had the management of this concern?"

To which question the State objected as immaterial.

The court erred in sustaining the objection of the State to the following question propounded by the counsel for defendant to the witness Atkinson, on the same page of the transcript of evidence herein:

Q. "And during the eight years you have had more or less business, have you, Mr. Atkinson, for the Royal Milling Company, with the merchants of Great Falls?"

To which question the State objected as immaterial.

The court erred in sustaining the State's objection to the question propounded to the witness Atkinson, as it appears on the same page of the transcript of evidence herein, which question is as follows:

Q. "And you transacted business with Mr. Junkins, the predecessor of Mr. Burrell, and who afterwards became the partner of Mr. Burrell's?"

To which question the State objected as immaterial.

The court erred in sustaining the State's objection to the question propounded to the witness Atkinson, which appears in the
18 transcript of the evidence herein on page 13, as follows:

Q. "Isn't it a fact, Mr. Atkinson, that during the year 1899 that Archie Burrell had a larger account with you than he has ever had since?"

To which question the State objected as immaterial.

The court erred in sustaining the State's objection to the question propounded to the witness Atkinson, as appears in the transcript of the evidence herein, as follows:

Q. "I will ask you if you haven't stated, and know it to be a fact, that it had been represented to you, prior to March 20th, 1901, that Archie Burrell, this defendant, was indebted to Henry Burrell?"

To which question the State objected as not in proper form and immaterial.

The court erred in sustaining the State's objection to the question propounded to the withess Atkinson, as appears on page 15 of the transcript of evidence herein, as follows:

Q. "And isn't it a fact that during that two years, and prior to March 20th 1901, he had owed you much larger bills than he owed on March 20th?"

To which question the State objected as immaterial.

The court erred in overruling defendant's objection to the question propounded to the witness Curtis, as appears on page 46 of the transcript of evidence herein, as follows:

19 Q. "Did he tell you how much he was indebted in those conversations that you had with him?"

To which question the defendant objected as immaterial, irrelevant and incompetent.

The court erred in overruling defendant's objection to the question propounded to witness Curtis, as it appears on the transcript of evidence herein, on page 47, as follows:

Q. "When did he give you that statement, Mr. Curtis?"

The grounds of objection being as follows: "I object to the statement, or any further cross-examination with reference to it, upon the ground it is incompetent, for the reason it is subsequent to the charge in the information, and it is immaterial and irrelevant, not competent."

The court erred in overruling the defendant's objection to the admission in evidence of Exhibit C, as appears in the transcript of evidence herein, on page 47, which objection was as follows: "We object to the statement, if the court please, upon the ground that it is immaterial and irrelevant, and embodies a lot of matters that are not justified by the pleadings, and immaterial and irrelevant to prove any issue in this case, and for the further reason the statement does not purport to be any statement; it is unsigned and has not been properly identified."

20 The court erred in overruling the defendant's objection to the question propounded to the witness Curtis, as it appears in the transcript of the evidence herein, at page 48, as follows:

Q. "It wasn't mentioned. What if any verbal statement did he make with reference to his assets and liabilities in addition to the written statement herein?"

To which question the defendant objected as immaterial, irrelevant and not competent.

The court erred in overruling the defendant's objection to the question propounded to the witness Curtis, as appears in the transcript of the evidence herein on page 48, as follows:

Q. "What was the occasion of your having these conferences with him?"

To which question the defendant objected as immaterial, irrelevant and not competent.

The court erred in overruling defendant's objection to the ques-

tion propounded to the witness Curtis, as appears on page 49 of the transcript of the evidence herein as follows:

Q. "Have you learned since, from what he has said in your presence, that he has and did owe people?"

To which question defendant objected as incompetent and leading.

The court erred in overruling defendant's objection to the introduction of Exhibit D in evidence, as appears on page 54
21 of the transcript of evidence herein. Said objection was as follows: "We object to it as immaterial and irrelevant and incompetent and not properly identified, and does not tend to prove any issue in this case."

The court erred in sustaining plaintiff's objection to the question propounded to the witness Burrell, as appears on page 68 of the transcript of the evidence herein as follows:

Q. "Mr. Burrell, I will ask you whether or not any members of the Royal Milling Company, or anybody at their instance or request, has approached you to acquire money and have this prosecution dropped?"

To which question the State objected as immaterial and no defense to this action.

The court erred in sustaining the State's objection to the question propounded to the witness Burrell, as appears on the same page of the transcript of the evidence herein, as follows:

Q. "Mr. Burrell, have you had any conversation with any person acting for the Royal Milling Company, with reference to your paying the Royal Milling Company $825.00 and having this case dismissed?"

To which the State interposed the same objection as to the foregoing question.

The court erred in sustaining the State's objection to the question propounded to the witness Burrell, as appears on page 70 of the transcript of the evidence herein, as follows:

22 Q. "I will ask you, Mr. Burrell, whether or not any one has had a conversation with you representing Mr. Atkinson, the witness in this case, with reference to your paying a certain amount of money and the prosecution being dropped?"

To which question the State interposed the same objection.

The court erred in sustaining the objection of the State to the question propounded to the witness Burrell, as appears on the same page of the transcript of evidence herein, as follows:

Q. "Mr. Burrell, I will ask you if within the past two weeks, in the city of Great Falls, if Mr. William G. Downing acting for and on behalf of Mr. Atkinson, the witness in this case, if he didn't approach you and propose to you that in payment of $825.00 the Royal Milling Company would drop this prosecution?"

To which question the State objected as no defense to this prosecution.

The court erred in sustaining the State's objection to the question

propounded to the witness Burrell, as appears on page 72 of the transcript of the evidence herein, as follows:

Q. "Had the Royal Milling Company, prior to that time, extended to you a larger amount of credit than they had on the 19th of March, 1901?"

23 To which question the State objected as immaterial.

The court erred in overruling the defendant's objection to the question propounded to the witness Burrell on cross-examination, which is as follows:

Q. "And you didn't know when you were interrogated at the other hearing that wasn't criminal?"

To which question the defendant objected as calling for a conclusion of the witness and incompetent.

The court erred in overruling the defendant's objection to the question propounded to the witness Burrell with reference to Exhibit F, which is as follows:

Q. "That was when you were figuring or making three payments, was it not? Getting your account squared up say to the first of June?"

To which question the defendant objected as immaterial and irrelevant, and for the reason that the account itself shows it has been mutilated, the date of the matter has been torn off, and it is a long time subsequent to any statement rendered the Royal Milling Company and immaterial and irrelevant for that account.

The court erred in permitting the witness William M. Atkinson to be recalled in rebuttal, and overruling the defendant's objection, which was as follows: "Defendant objects to Mr. Atkinson testifying for them in this case. Yesterday afternoon while our witnesses were on the stand, after he had been directed to remain outside

24 the room, he sat in here and listened to the testimony given by the defendant in this case, contrary to the order of the court."

The court erred in overruling defendant's objection to the question propounded to the witness Atkinson on rebuttal examination, as follows:

Q. "Yes. What were the alterations there?"

To which question the defendant objected as not proper rebuttal testimony; there is nothing to rebut; and immaterial and irrelevant."

The court erred in overruling defendant's objection to the question propounded to the witness Atkinson in rebuttal as follows:

Q. "Then those three payments together would have paid him up to that date?"

To which question the defendant objected as immaterial and irrelevant, not rebuttal evidence.

The court erred in overruling defendant's objection to the question propounded to the witness Heisey, as a rebuttal witness as follows:

Q. "Mr. Heisey, you may state whether or not—just what took place between you and Mr. Ellsworth yesterday."

To which question the defendant objected as not rebuttal evi-

dence, immaterial and irrelevant. Mr. Heisey was questioned as to the conversation; Mr. Ellsworth went on and testified to it to-day, and that's all there was to it.

4. The court misdirected the jury in material matters of
25 law, to-wit:

The court erred in giving the jury the following instructions, numbered 1 and 2, which said instructions were requested by the State, and which were as follows, to-wit:

"The court instructs the jury that when a person knowingly and designedly, by false or fraudulent representations defrauds any other person of property, it is no defense that defendant had no intent to defraud when he obtained goods by false representations, but fully intended to pay for the goods and felt sure of his ability to do so when the bill would become due. (34 Pac. 826.)"

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary, and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense when he made such admission, if he did make any such."

The court erred in giving the following instruction, requested by the State, to-wit:

"The court instructs the jury that the obtaining of property by false pretenses is complete when the property has been obtained by such means, and the offense would not be purged by sub-
26 sequent restoration or repayment. (34 Pac. 826; 105 Mass. 163.)"

The court erred in giving the following instruction to the jury: "Evidence of certain statements of the financial condition of the defendant, furnished by him to one Gold T. Curtis and to the witness Heisey, has been admitted in this case, but you are instructed that those statements have been allowed as evidence in this case for the purpose only of illustrating, if they do, the intent that the defendant had when he furnished to the Royal Milling Company the statement alleged to have been furnished said company by him about the 20th of March, 1901, and for no other purpose."

5. Material written evidence tending to establish the innocence of the defendant of the charge whereof he has been convicted herein, has been intentionally destroyed, removed or secreted, so that it cannot be produced on the trial of the said cause, to-wit:

That said William M. Atkinson, managing agent of the Royal Milling Company, and W. A. Appel, assistant managing agent of the said company, and who were witnesses that testified for and on behalf of the State in said trial, intentionally destroyed, re-
27 moved or secreted a financial statement rendered by Archie Burrell, and presented to them on the 19th day of March, 1901, on which was notated the indebtedness to Henry Burrell, and which said written statement was the statement that was presented,

and no other, and which would have been material evidence tending to establish the innocence of the defendant of the charge whereof he has been convicted herein.

6. Accident and surprise which by ordinary prudence could not have been guarded against.

Defendant was taken by surprise by the testimony of W. A. Appel, one of the witnesses for the State herein, and assistant managing agent for the Royal Milling Company, to the effect that only one written statement was rendered to said Royal Milling Company by Archie Burrell, the defendant herein, when said W. A. Appel had testified in the lower court that two other statements had been rendered, and one of said statements is the statement referred to upon which said notations were made, and which were intentionally destroyed, removed or secreted by said Appel and Atkinson.

7. The jury received evidence out of court other than that resulting from a view of the place in which the crime is charged to have been committed, to-wit:

The jury received in their jury room, at the hands of T. P. Green, court bailiff, Exhibit F which was marked for identification
28 herein, and which was a mass of figures on a piece of paper, and which was immaterial and irrelevant in the case, and which was not received in evidence, and was not a communication, document or paper referring to the case, and that some of the jurors rendered their verdict upon, or were influenced in rendering their verdict by, said paper marked Exhibit F.

8. The jury received evidence, papers and documents not authorized by the court, to-wit:

The jury received Exhibit F, at the hands of the court bailiff, which was never offered, received or allowed in evidence, and which was not authorized by the court, and was received by said jury after retiring to the jury room, and after the court had adjourned, and without the knowledge or consent of said defendant or the court.

9. The verdict is contrary to law in this, to-wit:

The verdict was not justified by the evidence in the case, and the evidence shows conclusively that there was no intent to defraud, or to obtain goods, wares and merchandise from the Royal Milling Company, a corporation, by the defendant herein, and the evidence shows that the goods, wares and merchandise alleged to have been furnished by said Royal Milling Company were not furnished by reason of any statement rendered to the Royal Milling Company, and that the Royal Milling Company had received more
29 money from said defendant, Archie Burrell, than credit extended to him by them since March 20th, 1901.

10. Newly discovered evidence or new evidence material to the defendant has been discovered since the trial of this cause. Such testimony was unknown to the defendant at the time of said trial, and defendant used due diligence in preparing his case for trial and endeavoring to discover such testimony and that such evidence can be produced on another trial of this case.

This motion will be based upon affidavits hereinafter to be pre-

pared, served and filed, bill of exceptions hereinafter to be prepared, served and filed, and upon the records and files of said case. And defendant upon the hearing of his said motion will rely upon each and every of the errors heretofore specified.

CULLEN, DAY & CULLEN,
J. A. LARGENT,
Attorneys for Defendant.

Service of the foregoing notice of intention to move for new trial is hereby admitted this 19th day of October, 1901.

A. C. GORMLEY,
JOHN T. ATHEY, *Clerk,*
Attorney for the State of Montana and County Attorney in
30 *and for Cascade County, Montana, and Clerk of the Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.*

Endorsed: (Title of court and title of cause.) Notice of intention to move for new trial. Cullen, Day & Cullen, J. A. Largent, attorneys for defendant. Great Falls, Montana. Filed: Oct. 19th, 1901. John T. Athey, clerk, by G. B. Lock*a*hrt, deputy.

31 *Order of Court.*

Title of Court.

Title of Cause.

Upon motion of defendant, and for good cause shown, it is hereby ordered that the hearing of the motion for new trial in the above entitled cause be had as soon as the bill of exceptions is settled and allowed by the court, and affidavits prepared, served and filed on motion for new trial herein, or as soon thereafter as counsel may be heard.

Done in open court this 19th day of October, 1901.

J. B. LESLIE, *Judge.*

Dated Great Falls, Montana, October 19th, 1901.

Endorsed: Filed, Oct. 19th, 1901. John T. Athey, clerk, by G. B. Lockhart, deputy.

32 *Order of Court.*

Title of Court.

Title of Cause.

Upon motion of the defendant, and for good cause shown, it is hereby ordered by the court that the defendant do have thirty days from this date in which to prepare, serve and file affidavits on motion for new trial herein, and thirty days from this date in which to prepare, serve and file bill of exceptions to be used on motion for new trial herein, and thirty days from this date in which to prepare,

serve and file all other papers which may be used on motion for new trial herein.

Done and ordered in open court this 19th day of October, 1901.

J. B. LESLIE, *Judge.*

Dated Great Falls, Montana, this 19th day of October, 1901.

Endorsed: Filed, Oct. 19th, 1901. John T. Athey, clerk, by G. B. Lockhart, deputy.

33 *Bill of Exceptions.*

In the District Court of the Eighth Judicial District of the State of Montana in and for Cascade County.

THE STATE OF MONTANA, Plaintiff,
versus
ARCHIE BURREL, Defendant.

Be it remembered that the above cause came on for trial in the above entitled court on Tuesday, October 8th, 1901, before the Honorable J. B. Leslie, judge, sitting with a jury duly impanelled and sworn. Mr. A. C. Gormley and Mr. W. G. Downing appearing on behalf of the prosecution and Mr. John A. Largent appearing as counsel for the defendant, and the following evidence was introduced and proceedings had in said cause.

Before the opening statement of counsel for the prosecution, on motion of attorney for the defendant, all witnesses were called and excluded from the court room.

Thereupon W. M. ATKINSON, a witness of lawful age, was called and sworn upon behalf of the State, and testified substantially as follows:

34 My name is William M. Atkinson; I reside at Great Falls; I have lived here about eight years; my business has been that of merchant milling, flour milling. I am connected with the Royal Milling Company, a corporation, carrying on business here in Great Falls, Cascade county, Montana. I am the managing agent of the company and have full control of the property in that capacity. I am the head officer of the company here at Great Falls. I have control of all of the business, extending credit to customers and everything of that kind. I am acquainted with the defendant, Archie Burrell; have known him some three or four years probably. We sold him flour, cereals and grain; he began to deal with us I think in June, 1899, buying from us for his own account. He succeeded the firm of Junkins & Burrell at that time. He carried on business on Central avenue in Great Falls; his business was a groce-y business; he was a customer from 1899 continually up to the time that he quit business. On or about the 20th of March, 1901, I had a conference at my office in Great Falls, Cascade county, Montana, with Mr. Burrell. He had been owing us a considerable amount of money on account, and the purpose of his coming out there was to satisfy me as to the condition of his business and for the purpose of

substantiating his credit with our company. I requested him to come to see me. Prior to that time I had talked with him
35 about his account. I don't remember the particular number of times; we had been after him frequently to bring his account down closer,—to liquidate it in other words. I requested him to furnish us a statement as to his assets and liabilities. I wished to satisfy myself that he was worthy of the amount of credit that we were giving him. He was indebted to us at that time in the sum of $1100. When he came out that day he paid me three hundred dollars, which reduced his indebtedness to about eight hundred dollars. When he came out on the 20th of March he brought a statement of his business, that is the condition of the business, showing assets and liabilities, and the difference showing his net worth. I have not the statement. Mr. Stevenson had it last. (Paper produced marked and identified as Exhibit A.)

That is the paper I referred to. I first saw it in my office when it was handed to me by Mr. Burrell on the day that I have already testified to, the 20th of March. It was not signed when he first produced it and showed it to me. He signed it in my office at my request. The signature there "Archie Burrell" is his. It bore date January 1st, 1901, Mr. Burrell stated to me that he had not taken any later statement of his business, but that his business was substantially the same and probably in better shape than is represented by this statement.

Thereupon Mr. Gormley offered the statement in evidence. Counsel for the defendant objected to its receipt as follows:
36 We object to it being offered in evidence on the ground that the statement does not purport to be a statement rendered on the 20th day of March, 1901, and the statement shows that it is a statement of the business of January 1st, 1901, and on the ground that it is immaterial, irrelevant and not competent.

Which objection being overruled the defendant duly excepted. Thereupon Exhibit A was read to the jury.

EXHIBIT A.

Archie Burrel, fancy groceries and provisions, headquarters for choice teas and coffees.

Phone 216. 211 Central avenue.

GREAT FALLS, MONT., *Jan.* 1, 1901.

Statement of Archie Burrell Business.

CR.

Jan. 1.	Inventory	8,376.15
"	Fixtures, wagon and horses etc	1,803.60
"	Insurance paid	78.00
"	Bills receivable	6,470.98
		$16,728.73
"	Cash on hand	162.40
		$16,891.13

37 DR.

Jan. 1. Bills payable..... 6,914.76

By balance..... $9,976.37

ARCHIE BURRELL.

The witness continuing: I asked him if it was a correct statement of his business at that time and he said "Yes." I had heard it rumored that he was owing his brother a considerable amount and I asked him particularly if he was owing his brother at that time and he stated explicitly he was not. He had reference to Henry Burrell whose name was mentioned. The item of "bills payable" were not particularized, except our own, which he stated to me was the largest amount he was owing at that time. I do not remember whether this was in response to a question of mine or whether he volunteered it. He said the account he had with the Royal Milling Company was the largest he had at that time. I believe that he did state that most of his eastern bills were paid or reduced to small amounts. I do not remember whether he gave me a check before or after he gave me the statement, but my impression is that he gave me the check before rendering the statement. He knew what my object was in asking for this statement. I told him that we wanted to substantiate the credit we were giving him,—that is we wanted to justify ourselves in carrying him for the amount he was being carried for. It is customary with us to collect our bills once
38 a month. Mr. Burrel had gradually gone for a longer period and got to where it waa finally possibly three months' bills were charged to him on our books and naturally I felt rather worried over the payment; it was rather a large amount. He said that he was afraid that we would cut off his supply of flour and other goods,—that we would sue him for that from the fact that he had continually promised to come out and see me and make settlement and broke the promise. After he furnished me this statement I told him it would be all right to continue purchasing from us but we would have to have more frequent settlements; he would have to bring his account *doe* to a smaller amount.

We furnished him after that day flour, cereals and grain; I would have to refer to the ledger to ascertain the amount. Page 83 under letter B we sold him goods and charged his account after March 20th until the date that he discontinued business, $1197.43. We would not have furnished him these goods if he had not made the statement. It was upon the strength of that statement that we continued to carry him. There was no separate account of the goods he bought after March 20th; it was all kept in one running account, no change being made. He paid us after the 20th of March $970.56. I have no notation of the date of these payments, reading them from the ledger they are as follows:

Paid us on April 19th, 1901, $200; May 3d $175.56; May 18th $200.00; June 25th $395.00. We furnished goods after June
39 25th, 1901, amounting to $219.50. July 20th is the last item, $219.50.

I believed the statement that he furnished me to be true and relied upon it. I believed it to be true on the 20th of July when I last furnished goods to him. I got my first intimation that it was not true from a local item in the Great Falls Tribune. I then hunted up Mr. Burrel and he substantiated the item in the paper, which was that he had transferred his grocery business to Henry A. Burrell in consideration of notes that had been given previously. I did not know about the notes until I saw him that morning. I don't know what time it was; but it was after July 20th, two or three days. He gave me to understand that he had beeon owing his relatives and they had come down on him rather unexpectedly. He referred to his brother Henry Burrell and the notes that he had given to Henry Burrell. I do not think that the amounts were stated. It was understood that the amount was about eight thousand dollars, or eighty-two hundred dollars, in that vicinity. I said to him that I noticed that he had transferred his business for that consideration. He said that his relatives had come down on him and had pressed him for the money that he was owing them. He admitted owing them about eight thousand dollars. He gave no explanation as to how he owed the money. He did not give the length of time, excepting I understood him that it was an
40 accommodation loan and that he was to have it indefinitely, but that they had come to him unexpectedly. He did not say what length of time the notes had been running, simply stated that it was an old account. This was the same Henry Burrel that I enquired about on March 20th.

I was present later at a conference of the creditors with Mr. Burrell in Lawyer Maddox'- office; there was present Mr. Maddox, Mr. Matteson of the First national bank, Mr. Welch Mr. Stevenson and myself. There might have been one or two others that I don't recall. Mr. Mat Dunn was there. The discussion was about Mr. Burrell's financial standing for the purpose of making some arrangements that would be satisfactory to his creditors. I was a little late in arriving and there had already been a list of his liabilities made up. I gathered from what was said that the list was made from a verbal statement made by Mr. Burrell in that office; he gave the principal accounts that he was owing. This list footed up over $14,000. He said that was as complete as he could give it verbally. He said very likely there were other accounts he owed that he could not recall. The Henry Burrell notes he stated he had been owing for some time, but was not able to give the date. The notes were not in the office at the time. The other accounts I gathered were something similar to mine. They had been running for a month to three months probably. They were regular current ac-
41 counts that he had on his ledger. The creditors were mentioned and the amounts as closely as he could give them verbally from memory. The Henry Burrell notes were included; as I recall it they were listed at $8200 and some odd dollars.

I fix the date of the 20th of March by memory; that was during

March that he gave me this check. He only made one payment in March, so that the fact stands that he gave it to me on the 20th of March. I furnished him this merchandise in pursuance of the representation on the 20th of March.

Cross-examination:

I have not rendered my company my judgment as to the financial standing of the different merchants in this city. I have not conferred with my company at Minneapolis with reference to the credit or to the persons to whom we should extend credit in the city of Great Falls.

Thereupon counsel for the defendant asked the witness the following question:

Q. Then as I understand it, Mr. Atkinson, you have shouldered the responsibility of all credits that have been extended in
42 the city of Great Falls for the eight years that you have had the management of this concern?

To which said question counsel for the State objected as being immaterial, which objection being sustained by the court and the witness not being permitted to answer the same, the counsel for the defendant duly excepted.

Thereupon counsel for the defendant asked the witness the following question:

Q. And during the eight years you have had more or less business, have you Mr. Atkinson, for the Royal Milling Company with the merchants of Great Falls?

Counsel for the State objected to this question as immaterial, which objection being sustained by the court the defendant duly excepted.

The witness continuing: I have been extending credit to the merchants of Great Falls including Mr. Burrel for eight years last past. I did business with Mr. Junkins who was Mr. Burrell's predecessor in interest and who later became his partner. I don't think I transacted any business with Mr. H. Burrell when he was managing the Sand Coulee Coal Company. I do not know him personally, just know him by sight. I do not recall selling to Henry Burrell two car loads of bran. I do not recall the fact that two days after the copartnership of Junkin and Burrell was formed I had a conversation with Henry Burrell in my office of the
43 Royal Milling Company in which he stated to me that he had loaned Archie one thousand dollars to purchase the interest of Junkins. I do not recall Henry Burrel ever being in my office. I would not swear that no such conversation as that above stated took place. Our books show that we commenced doing business with Archie Burrell in June 1899. I did not investigate his financial standing particularly at the time. I had no statement and had no statement during the year 1899.

Thereupon counsel for the defendant asked the witness the following question:

Q. Isn't it a fact Mr. Atkinson that during the year 1899, Archie Burrel had a larger account with you than he has ever had since?

To which question the counsel for the State objected as being immaterial, which objection being sustained by the court the counsel for the defendant then and there duly excepted.

Witness continuing: We did business with Archie Burrell during the years, 1899, 1900 and part of 1901. I received just one statement from Mr. Burrell during that time,—only one written statement, I am positive about that. I don't recall any statement received from Archie Burrell that had on it pencil notations, and can swear that
44 no statement placed in my hands by Archie Burrell had pencil notations on it. If there had been any statement rendered to our company I would have had possession of it; I would have known of it.

Witness was then asked by counsel for the defendant:

Q. I will ask you if you have not stated and know it to be a fact that it had been represented to you prior to March 20th, 1901, that Archie Burrell, this defendant, was indebted to Henry Burrell?

To which counsel for the State objected as not in proper form, immaterial and failed to state when and where and who was present, which objection was by the court sustained, to which ruling defendant then and there excepted.

The witness continuing testified, that he had been doing business with Archie Burrell for more than two years and never asked him for a statement.

Whereupon witness was asked by counsel for the defendant the following question:

Q. And isn't it a fact during that two years and prior to March 20th, 1901, he owed you much larger bills than he owed on March 20th?

To which counsel for the State objected *to* as immaterial, whereupon the court sustained the objection, to which said ruling of the court counsel for the defendant then and there *accepted*.

45 S. A. BALLIETT, a witness of lawful age, sworn for and on behalf of the State, testified among other things as follows:

I am a lawyer by profession and at the present time referee in bankruptcy, appointed by the United States court of bankruptcy; I am familiar with the bankruptcy proceedings of Archie Burrell. I have the evidence that was taken before me as referee in bankruptcy in the matter of Archie Burrell at the first meeting of the creditors. (Witness here produced document and stated.) This is the testimony of Archie Burrell, bankrupt, taken at the first meeting of the creditors, held at Great Falls on the 16th day of August, 1901. The

testimony was taken by a stenographer in shorthand and afterwards reduced to writing by longhand and signed by Mr. Burrell.

Thereupon counsel for the State offered the document in evidence in this case, to which offer counsel for the defendant objected on the ground that it was immaterial, irrelevant, not properly identified and not competent, to which objection the court stated:

"I don't think it is competent as yet."

Thereupon the document was left by witness with counsel for the State.

46 GOLD T. CURTIS, a witness of lawful age, was sworn on behalf of the State and testified among other things as follows:

I am the president of the First national bank and am acquainted with the defendant in this case. He has been a customer of the bank and during the year I have had a number of talks with him as to his financial condition. I had these at different times from the first of the year up to the time he failed in business.

Thereupon the witness was asked the following question:

Q. Did he tell you how much he was indebted in those conversations you had with him?

To which counsel for the defendant objected as immaterial, irrelevant and incompetent, which objection the court overruled stating that the question was competent for the purpose of showing intent only, to which said ruling defendant then and there excepted.

Thereupon the witness answered the question as follows:

A. Yes he made a statement two or three times.

Witness thereupon presented and identified paper marked Exhibit C as the statement given him in May 1901, along about the 27th.

47 Thereupon counsel for the defendant objected to the statement or any further cross-examination in reference to it upon the ground that it is incompetent for the reason that it is subsequent to the charge in the information and is immaterial and irrelevant. Which said objection was by the court overruled, to which the defendant then and there excepted.

The witness continuing testified that the statement was in the handwriting of Mr. Burrell, that is he should say it was all Mr. Burrell's handwriting. The statement is now the same as it was when it was handed to the witness.

Thereupon counsel for the State offered Exhibit C in evidence, to which said offer defendant then and there objected on the ground that it was immaterial, and irrelevant and embodies a lot of matters that are not justified by the pleadings, and for the further reason that the statement does not purport to be any statement; it is unsigned and has not been properly identified. Which said objection was by the court overruled to which ruling of the court the defendant then and there excepted.

Thereupon Exhibit C was read to the jury.

48 EXHIBIT C.

(Sheet 1.)

I need

Lindsay & Co	100.00
D. Williams	100.00
Swift check	136.40
Aroma coffee	189.00
Reid M. & Co. cke-k	204.80
Foley Bros. & K. che-k	50.50
Dun McLean & Co	200.00
Bliss Syrup Co	108.65
	1089.35
(In pencil:)	204.80
	50.50
	255.30

(Sheet 2.)

(Written on Archie Burrell bill head.)

Li-bility.	June.	July.
California Fruit Evap. Co	31.05	
Conrad Knival	10.98	
A. C. J. Haase & Co	35.65	
Fairbank & Co	12.40	106.20
Lindsay & Co	200.00	100.00
Mitchell -oul & Bros	46.85	
49 D. Williams	115.40	
G. A. Boyle	14.40	
J. J. Thompson	50.40	71.20
Royal Milling Co	250.00	320.00
Hammond Crocking Co	42.40	110.40
Calender Vandehoef	24.95	
Aroma coffee	189.00	
National Biscuit Co	96.96	
Dun McLean Mer. Co	200.00	218.68
Read Murdock & Co. check	204.80	335.44
Closset & Daven	22.13	
Felix Morston & Co	7.45	89.90
Leego & Haskel	42.00	
L. Cohn	100.00	93.80
Lee Broome Comp'y	.....	24.70
Heimenger Produce Co	19.30	
Pecific Co-st Syrup Co	22.60	
June 31. Schilling & Co	.....	89.23
Aug. 22. "	.....	136.32
Miller Osbun & Co.	77.50	
Bliss Syrup Co	108.65	

Li-bility.	June.	July.
C. E. Heisey	75.40	103.20
C. H. Bestman & C-	60.40	102.70
J. J. Farrell & Co	170.10	122.40
Swift & Co	136.40	
	2324.92	2224.17
50 Bank		1200.00
		3523.92

(Sheet 3.)

(Written on Archie Burrel bill head.)

Assets.		
5 horses	300.00	
4 wagons	325.00	
1 buggie	25.00	
4 sets harness	90.00	
1 cash register	100.00	
3 set- scales	125.00	
1 ice chest & box	40.00	
1 oil tank	50.00	
Coffee mill & shoe *cons*	40.00	
Shelving counters & S	675.00	
	1770.00	
Stock at cost		1770.00
Taken May 25th		8125.40
Collection May 25		7123.40
		17,018.80
Dr. li-bilitys		5,748.09
		$11,270.71

51 (Sect 4.)

(Written on Archie Burrel letter head.)

GREAT FALLS, MONT., *May* 27, 1901.

Reid Murdock & Co	204.80
Lindsay & Co	100.00
D. Williams	100.00
Swift & Co	136.40
G. F. Produce Co	75.00
Foley Bros. & Kelley	50.40
Drafts { 14.40 / 32.40 }	46.80
	713.50

If I can arrange to pay the above I can pay it back from my collection in June and it will put me in shape and will be able to pay all other bills.

The witness proceeding testified: That the statement as I understood at the time from him (Mr. Burrell) represented his assets and liabilities, the two columns, one is for the one due within a certain time, coming due near that time, and the others are not so near; that is the reason he made them that way. The two added together would show the total liabilities. There was not anything said between witness and Mr. Burrell as to any indebtedness to his brother Henry Burrell.

Thereupon witness was asked the following question:

52 Q. What, if any, verbal statement did he make with reference to his assets and liabilities in addition to the written statement here?

To which counsel for the defendant objected on the ground that it was immaterial, irrelevant and not competent, which objection was by the court overruled, to which ruling of the court the defendant then and there excepted.

Whereupon the witness answered:

A. Why he always gave me to understand that he was in good shape and could pay his bills, everything that he owed. He made these statements to me from time to time, a number of them.

Thereupon the witness was asked:

Q. What was the occasion of your having these conferences with him?

A. Well I did not think that he was doing business as he ought to be, and I wanted him to pay the bank up what he owed us; I renewed loans from time to time.

To which testimony counsel for defendant objected as immaterial and irrelevant, which objection the court overruled, stating that the testimony was admitted only for the purpose of illustrating intent. To which ruling of the court counsel for defendant then and there excepted.

Witness further testifying stated that all of his statements written and verbal were made for the purpose of affecting his credit.

53 He certainly never told me that he owed other people, for I never knew he owed them, if I did I would not have given him a cent. I have learned since from what he has said in my presence that he has and did owe other people.

54 CHARLES E. HEISEY, a witness of lawful age, called and sworn on behalf of the State testified as follows:

I am a travelling man, representing Ried, Murdock & Co., wholesale grocers; I have had dealings with the defendant Burrell. He has furnished us with a statement with which to get credit with our house.

Witness produced paper marked Exhibit D as one of the statements referred to.

That paper is signed by Mr. Burrell and by myself. I filled in the written part at his dictation. I read the questions to him and he gave me the answers and I wrote them down.

Thereupon counsel offered Exhibit D in evidence to which offer defendant objected on the ground that it was immaterial, irrelevant and incompetent and not properly identified, does not tend to prove any issue in this case, which objection was by the court overruled. To which ruling of the court defendant then and there excepted.

Thereupon Exhibit D was read to the jury.

EXHIBIT D.

Town or city, Great Falls. State, Montana.

Date, Feb'y 4, 1901.

Messrs. Reid, Murdock & Co. (incorporated), Chicago, Ill.

GENTLEMEN: For the purpose of obtaining credit with you
55 for merchandise or advances which we may now or hereafter obtain and purchase of you, and for extensions of time by note or otherwise, I Archie Burrell of the firm of same of the city of Great Falls in the county of Cascade and the State of Montana do make the following and complete statement of the resources and liabilities of said firm, and of each individual member thereof; and, in event of sale of business, failure or insolvency it is hereby agreed that all indebtedness then existing shall be considered due and payable.

Resources.	Dollars.	Cents.
The stock of merchandise on hand at low value Jan. 1, 1901	8376.13	
Furniture and fixtures in store, low value, is Jan. 1, 1901.	1803.60	
Notes and accounts, good, are	6470.98	
" doubtful, are		
Cash on hand in store	161.00	
Cash, in what bank, and amount		
Other personal property (describe it)	None.	
No. horses 5 Value		
No. wagons 5 "		
Give description and value of real estate, and in whose name it stands (write section, township, range, county and State)	None.	
Total assets	16,811.73	

Liabilities.	Dollars.	Cents.
56 Give names of parties to whom owing for merchandse, and amounts,		
Owing for mdse., total	6,300.00	
Amount of borrowed money by the firm, and each member	614.76	

To whom owing? Chas. E. Heisey
What security? Don't need any.
When due? Any time. Rate of interest? 1 %
Any chattel mortgages on your stock, fixtures, horses and wagons, or other property? No.
On what property? No. When due? No.
To whom given? No. *No.*
Any mortgages on your real estate? If so describe on each piece, when due, rate of interest, None.

Total liabilities	6914.76	

Homestead, in whose name does it stand? —.
Names of partners and interest of each, as follows:

Rent of store per month	100.00	

When does lease expire?

Cash	700	
Monthly sales credit	4300.00	
State insurance on stock and fixtures	7000.00	
" buildings		

57 Give the name of each company
Buy principally of the following firms:
Names to whom owing past due accounts and amounts,
Any of above accounts closed by notes? If so name them. No.
Do you owe on any judgments? No.
Are you owing anything for wages? No.
Are you owing to wife or relatives? No.
If so, to whom and amount? No.
Are you surety on notes or bonds for any one? No.
Do you owe any confidential, and other debts not included in above? No.
Does the above statement show all your resources? Yes.
And liabilities of every kind and nature whatsoever? Yes.
Individual names of members of the firm.
Single or married, Age —
Single or married, Age —

The above statement, both printed and written, has been carefully read by me, and is a full and correct statement of the financial condition of our firm, and of each individual member thereof, and we hereby agree to immediately notify you of any change in the above statement or anything affecting our financial situation.

Signature, ARCHIE BURREL.

In presence of
CHAS. E. HEISEY.

58 When the words "no" or "none" will correctly answer the question, please write them in their proper place.

59 Thereupon the State called as witnesses Henry A. Burrell, Frank C. Lampen, Henry Welch, David Craig, and S. A. Balliett, who after being respectively sworn testified without objection.

Thereupon the State rested, and the defendant to support the issues in his behalf presented himself as a witness and after being duly sworn testified as follows:

I am the defendant in this case; I reside at Great Falls; I have been in the grocery business on Central avenue for about three years, the last two years doing business under the name and style of Archie Burrell; previous to that Junkin & Burrell. I have been doing business with the Royal Milling Company for about two years. Exhibit A was rendered and presented to the Royal Milling Company about the 4th or 5th of January, 1901. I presented a statement to Mr. Atkinson on the 19th day of March 1901, which differed from Exhibit A in that the top part of it was just the same, but Mr. Atkinson asked me if I didn't owe my brothers and I pencilled on the bottom that I owed my brother individual loans for about seven thousand dollars. And he took the statement that was rendered at that time and says "Here you take and pay up this statement at so much a month and go ahead and pay your accounts as they run; that is I was to pay what I could on the old account, so much a month. Under that arrangement I came back
60 to the store and sent him a check for three hundred dollars and the account has run that way ever since.

The statement that has been offered in evidence here by Mr. Curtis was given on the 29th of May, 1901, and rendered after the bank had extended to me credit. At the time the statement, Exhibit C, was rendered to Ried, Murdock & Co. Mr. Heisey understood the indebtedness to my friends. He said "Well you need not mind those things; you owe me some but you needn't put it all down, and he made out this; I was sitting in his office, I did not have my books or anything else and he wanted me to give a kind of outline of what I thought it would be outside of those accounts. I told him that there was other indebtedness, but I did not offer to put it in the statement, because he said he did not want it.

Thereupon the witness was asked the following question:

Q. Mr. Burrell I will ask you whether or not any of the members of the Royal Milling Company, or anybody at their instance and request has approached you to acquire money and have this prosecution dropped?

To which counsel for the State objected *to* as immaterial and no defense to this action. Which said objection was by the court sustained, to which ruling of the court defendant then and there excepted.

61 Witness was thereupon asked:

Q. Mr. Burrell have you had any conversation with any person acting for the Royal Milling Company with reference to your paying the Royal Milling Company $825 and having this case dismissed?

The same objection and same ruling, to which ruling of the court the defendant then and there excepted.

Thereupon witness was asked:

Q. I will ask you Mr. Burrell whether or not any one has had a conversation with you representing Mr. Atkinson, a witness in this case, with reference to your paying a certain amount of money and the prosecution being dropped?

Same objection, same ruling, to which counsel for the defendant then and there excepted.

Thereupon witness was asked the following question:

Q. Mr. Burrell I will ask you if within the past two weeks, in the city of Great Falls, if Mr. William G. Downing, acting for and on behalf of Mr. Atkinson, the witness in this case, if he didn't approach you and propose to you that in payment of $825 the Royal Milling Company would drop this prosecution?

To which question the counsel for the State objected as no defense to the prosecution, the objection was sustained, to which ruling of the court the defendant then and there excepted.

62 Thereupon witness testified that on the 19th day of March, 1901, he rendered a statement to the Royal Milling Company, but that the statement was not rendered with any intention of obtaining goods or credit from the Royal Milling Company or for the purpose of defrauding or misrepresenting to them the condition of his business.

Thereupon he was asked:

Q. Had the Royal Milling Company prior to that time extended to you a larger amount of credit than they had on the 19th of March, 1901?

To which counsel for the State objected *to* as immaterial. The objection was sustained, to which ruling of the court the defendant then and there excepted.

Witness being cross-examined by Mr. Gormley for the State, testified, among other things, as follows:

I believe I testified before the referee in bankruptcy. I signed the testimony. It was taken down by a stenographer. I looked it over as well as I could before signing it.

Thereupon counsel for the State reading from the testimony produced and left with him by the referee in bankruptcy, S. A. Balliett, interrogated the witness as follows:

Q. Was this question asked you, "Do you remember whether you told Mr. Curtis how much you owed?"

A. I think it was.

63 Q. And you answered, "No sir"?

A. Yes, because I didn't think of it.

Q. "You don't remember whether you told anybody else at all?" A. No sir, I don't," was that question and answer given?

A. I think it was.

Q. Was this question asked you, "Do you know whether you told Mr. Atkinson of the Royal Milling Company of any private indebtedness," to which you answered "I don't remember." Is that right?

A. I did.

Q. That question was asked you and you testified then that you did not remember whether you had told Mr. Atkinson of any private indebtedness?

A. Well there was a lot of them asking me questions and I didn't know what they were asking me part of the time.

Q. This question was repeated, "You don't remember that you told Mr. Atkinson or anybody connected with the Royal Milling Company of this indebtedness" and you answered "Well I don't remember now whether I did or not." Is that correct?

A. I think that is right.

Q. That is a fact?

A. For that answer, yes.

Q. When was your memory better,—at the time this was taken or several months afterwards?

64 A. Further down on that same thing I think you will find it.

Q. Now this testimony was given and answered by you wasn't it? "It was a statement (referring to the statement of Mr. Curtis) that Mr. Curtis wanted to know about how I stood when I was renewing the note." You so testified?

A. No, I don't think I testified——

Q. Well that is the way the answer is given isn't it?

A. Well I don't know whether that is right or not.

Q. That is the way your answer is given there isn't it?

A. Well you don't—they didn't show me what statement it was at that time.

Q. What other statement could you have been testifying about? Did you furnish Mr. Curtis any other statements?

A. I think I did.

Q. There was only one statement produced there at the hearing before the referee?

A. I think that was all, one statement; it was not supposed to be a statement either at that time.

Q. And you testified that you gave the statement because Mr. Curtis wanted to know about how you stood when you were renewing that note?

A. I didn't see the statement or the date of it; the date of it is when it was given.

65 Q. You did give him a statement to satisfy him when you were renewing a note at the bank?

A. No sir I did not, the note was renewed before the note was given.

Q. Why did you testify you gave a statement because he wanted to see how you stood when you were renewing the note?

A. I think Mr. Stephenson brought that statement of the Royal Milling Company at the time.

Q. What had that to do with it?

A. I think that was the statement he was talking about and I got mixed on it.

Q. Then you never did give a statement for the purpose of getting a note renewed at the bank?

A. No sir I never gave a statement to get a note renewed.

Q. Why did you state that you did at this hearing?

A. I said Mr. Stephenson had the other statement in his hand and I got mixed on the two statements as I told him.

Q. This question was asked you about these statements: "You took them then to the First national bank?" "Yes sir." Is that right?

A. I think that was right.

Q. "What was your purpose about taking them there?"
66 "Well he wanted to know how everything was." Is that right?

A. No sir Mr. Curtis didn't call for a statement, I took that statement over there to show him that I couldn't pay his account, as much as he wanted me to pay it at that time.

Q. Now this question was asked you, "At that time you went to solicit a loan didn't you?"

A. No sir I didn't.

Q. Well that question was asked you wasn't it Mr. Burrel?

A. I believe it was.

Q. Didn't you answer this way: "No I don't think it; I went to renew a loan."

A. Well I may have answered that.

Q. Did you change this afterwards yourself: "I had renewed a loan," changed it from the way I read it to that; that is your writing there?

A. Yes sir.

Q. You changed that did you?

A. Yes sir.

Q. The stenographer had "I went to renew a loan," you changed it to "I had renewed a loan"?

A. Yes, sir.

Q. Then the question was asked you: "By the words 'I need' at the top of the paper?" and the answer was "That was to show that I couldn't pay any of that off, I think." Did you so testify?
67 A. Yes, that was it.

Q. The statement was that you could not pay them the note?

A. That I couldn't pay any of the note. That was the note that I was getting renewed, that I couldn't pay any of it at that time.

Q. So you had to renew it?

A. Well they wanted me to pay more than I could.

Q. Then the question was asked you: "And you did procure a renewal of the $600 note a few days after at the First national bank?" To which you answered: "I don't remember." Is that right?

A. Well, I guess it is, I don't remember.

Q. You didn't remember at that time whether, you got a renewal after that or not?

A. No sir.

Q. How do you remember it so much better now?

A. Because I saw the paper, and I didn't see those statements then.

Witness continuing testified that he did not have any arrangements with Mr. Henry Burrell, or Henry A. Burrell that he was not to pay the notes given by him to them; they were not to enforce unless somebody else threatened to. Whereupon witness was interrogated by counsel for the State with reference to the testimony taken before the referee in bankruptcy as follows:

68 Q. At the hearing before the referee this question was asked you: "You never had any arrangements by which he was not to enforce it against you?" And you answered: "I had no arrangements at all, nothing of that kind."

A. That's right.

Witness continuing testified that he told Mr. Curtis about his indebtedness to Henry Burrell several times and that he had told several persons about it.

Whereupon he was interrogated by counsel for the State with reference to the testimony before the referee in bankruptcy as follows:

"Q. Now at the hearing before the referee this question was asked you was it not, after you testified that you told Mr. Curtis: "Who else did you tell of this indebtedness?" To which you answered: "Well I don't think I told anybody about it." Is not that question and answer given?

A. Well there is an answer given later on that explains that; there — three or four lawyers shouting questions at me and I did not know which one I was answering half the time.

Witness continuing, I think I told Mr. Curtis how much I owed him at the time; I think I told him that I borrowed quite an amount of money; I did not specify the amount the first time. I did tell him that I had borrowed from my brother along from six to seven thousand dollars.

69 Thereupon counsel for the State, reading from the testimony taken before the referee in bankruptcy interrogated the witness as follows:

Q. Now at the hearing referred to the question was asked you "Do you remember whether you told Mr. Curtis how much you owed?" and you answered: "No sir." Is that right?

A. I had explained that to Mr. Curtis.
Q. Well you so testified did you?
A. If it is there I must have.
Q. Was that true or false?
A. Well I don't know how that is, because I was worked up over it and I didn't know what they were asking me half the time.
Q. And you didn't know when you were interrogated at the other hearing that wasn't criminal?

To which question counsel for the defendant objected as calling for a conclusion of the witness and incompetent. Objection overruled to which counsel for the defendant then and there excepted.

A. Well I did not expect it was criminal either ways at that time.

Q. The question was asked you also again: "I will ask you whether you can remember anybody else that you told of this private indebtedness besides Mr. Ewing and Mr. Curtis?" and you answered: "I don't know; I don't remember." Is that right?
70 A. I suppose that is right if it is on there.
Q. "You don't remember whether you told anybody else at all?" The question was put to you and you answered: "No sir I don't." That was right was it?
A. I believe I answered that.
Q. "Do you know whether you told Mr. Atkinson of the Royal Milling Company of any private indebtedness?" Did you so testify?
A. I suppose so, if it is there; I don't remember it.
Q. The question was asked you again further on: "Did you tell him (Mr. Curtis) what this indebtedness was?" and you answered him: "I didn't tell him the amount, I don't think." Is that right?
A. "Well I suppose that is right; I didn't remember at that time.
Q. "Did you tell him to whom you owed or the amount?" And you told him: "I don't remember whether I told him to whom or not." Is that right?
A. Well I don't know, I guess that is what I mentioned there, but I had explained it several times.
Q. Now the question was asked you: "What was your idea in furnishing the bank a statement after you had arranged your business matters with them?" and you answered: "They wanted a payment that was coming on the next one, they wanted me to make a payment on another note that was coming due?" Was that question and answer given?
71 A. I think it was.
Q. Then the fact was when they called for this statement and you furnished it, it was because they wanted a payment that was coming due on another note?
A. No they wanted me to pay a note at that time and I took that statement over to show them that I had certain payments to make

and I couldn't possibly pay all that they demanded.

Q. What did they want you to pay on?

A. Wanted to pay on a note that was coming due.

Q. I thought you testified on direct examination they wanted you to pay a draft?

A. That there one was explained that I had to pay part of the money on the draft; I wrote to the parties and told them that I couldn't pay all the draft and sent it back and I explained to Mr. Curtis and Mr. Matteson when they wanted to send that draft back, and I said "You send it back and I will write them;" that was a draft, and I says "That is one of the reasons I can't pay all that note.

Q. But your idea is you testified at the hearing in furnishing the statement was on account of their demanding payment on a note that was coming due; isn't that right.

A. No it wasn't demanding payment; it was to show them that I could not pay all of a certain note.

72 Q. Well, that was your answer given at the hearing was it not, to that question? That isn't correct as you testified then?

A. Well it isn't worded right.

Q. Well it was then again asked you what was your idea in making this statement—referring to the bank statement—you answered: "Because I wanted to show them the necessity of not being able to pay as much on account as they said."

A. That is what I explained to them.

Q. That was correct was it?

A. Yes.

Q. Then the question was further asked you: "Did you get renewals here late as the 24th of the last month? You got renewals unquestionably after this statement on the note which is now attached to the bank's claim?" And you answered: "Yes sir." Was that question and answer given?

A. I didn't get it on the strength of that statement.

Q. Well you so testified at the hearing, did you not?

A. Well I may have answered that question, not watching what the others was asking me, that way.

Q. You testified wrong did you at that time?

A. Well I don't know whether I testified wrong or not, or whether they got it down wrong; there was half a dozen talking all the time there, you——

73 Q. But you didn't make any correction in that testimony when you read it over, did you?

A. I did not.

Q. The question was asked you: "What was your purpose in taking the statement to them? It was for the purpose of showing them how you stood, was it not?" You answered "Yes sir."

A. Well it was for the purpose to show what I couldn't do for them.

Thereupon the witness was shown a paper marked Exhibit F, and asked if he had ever seen that paper before, to which he answered that he had, that he supposed it was a statement of some payments that Mr. Matteson wanted.

Thereupon he was asked by counsel for the State the following question:

Q. That was when you were figuring on making three payments, was it not, getting your account squared up to say to the first of June?

To which question counsel for the defendant objected, for the reason that the account itself shows it has been mutilated and it was a long time subsequent to any statement rendered the Royal Milling Company, and immaterial and irrelevant, which objection was by the court overruled, to which ruling of the court counsel for defendant excepted.

74 Whereupon witness testified that the figures looked as if they had been changed, but that those on the left and top corner were his figures. That he thought they indicated the amount Mr. Atkinson wanted him to pay.

Said Exhibit F was as follows:

EXHIBIT F.

(Written in pencil on a note head, the heading of the firm on top of the note paper having been torn off.)

	1041.74		
	375.56		
1061.83	666.18		
666.18			
395.65		June 22 20 days.....	395.65
		July 22 30 dy.....	300.00
		Aug. 22 60 dy.....	366.18
			1061.83

and will pay June a/c in July

A. BURRELL.

June a/c... 278.25
300.00

578.25

Thereupon Messrs. W. E. Ellsworth, Charles E. Heisey, and W. G. Downing were called as witness in behalf of the defendant, and after they had testified defendant rested.

Thereupon the State called in rebuttal Messrs. W. M. Atkinson and Charles E. Heisey, and after the same had testified plaintiff rested.

75 *Instructions to the Jury.*

Thereupon the court instructed the jury as follows, to wit:

Title of Court.

Title of Cause.

The defendant is charged by information with the crime of obtaining property by false pretenses, alleged to have been committed in the county of Cascade and State of Montana on or about the 20th day of March 1901.

To this information the defendant has entered a plea of not guilty, and it therefore devolves on the State to prove to your satisfaction, beyond all reasonable doubt, every material allegation of the information before you will be justified in finding the defendant guilty.

The material allegations of the information are that the defendant Archie Burrell, at the county of Cascade and State of Montana, on the 20th day of March, 1901, did commit the crime of obtaining property by false pretenses, as follows:

That the said Archie Burrell did, on the 20th day of March A. D. 1901, in the said county of Cascade and State of Montana, with force and arms, knowingly, designedly, fraudulently, unlawfully, falsely and feloniously pretend and represent to the Royal Milling Company, a corporation doing business in the city of Great Falls in the said county and State, that a certain statement in writing, which he, the said Archie Burrell, then and there had and pro-
76 duced, was a true and correct statement of his assets and liabilities at said time; a true copy of which statement so produced is as follows, to wit:

"GREAT FALLS, MONT., *Jan.* 1, 1901.

Statement of Archie Burrell Business.

CR.

Jan. 1.	Inventory	8,376.15
"	Fixtures, wagon & harness etc	1,803.60
"	Insurance paid	78.00
"	Bills receivable	6,470.98
		$16,728.73
"	Cash on hand	162.40
		$16,891.13

DR.

Jan. 1.	Bills payable	6,914.76
	By balance	$9,976.37

ARCHIE BURRELL."

That said statement was false in this, that the said Burrell therein stated that his bills payable amounted to the sum of $6,914.76, which statement was false and known to be false by said Burrell, and that said Burrell was then, and for a long time prior thereto, including January 1, 1901, and ever since has been indebted to various persons in various sums aggregating $14,000, and that at said
77 time said Burrell well knew that he was indebted in the sum exceeding $14,000, but falsely and fraudulently concealed his knowledge thereof; that said Royal Milling Company, believing that said false and fraudulent statement was true, and relying upon the truth of the same, and without any knowledge that the same was not true, did, between the 20th day of March, 1901, and the 20th day of July, 1901, sell and deliver to the said Archie Burrell goods, wares and merchandise, consisting of flour, cereals and grain, the property of said Royal Milling Company, of the value of $1,197, and extended credit to said Burrell therefor, for which said Burrell has not paid, and that said Royal Milling Company was induced to so sell and deliver said goods, wares and merchandise and extend credit to said Archie Burrell by reason of said false and fraudulent pretenses and by reason of said false and fraudulent statement, and that said false and fraudulent pretenses were so made by the said Archie Burrell and for the purpose and with the design of defrauding said Royal Milling Company of the same, and by reason of said false and fraudulent pretenses he did defraud said Royal Milling Company of said goods and merchandise.

The law presumes the defendant innocent until he is proven guilty beyond a reasonable doubt. This presumption of innocence should continue and prevail, throughout the trial of this case,
78 in the minds of the jury until they are satisfied by the evidence, beyond a reasonable doubt, that the defendant is guilty as charged.

A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt; nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as, in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind and considering all the evidence produced, it leads you to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

If you shall believe from the evidence, beyond all reasonable doubt, that the defendant Archie Burrell, at the county of Cascade

and State of Montana, on or about the 20th day of March,
79 1901, did commit the crime of obtaining property by false pretenses in the manner and form as charged in the information, that is to say, that the said Archie Burrell did, on or about the 20th day of March, 1901, in said county and State, with force and arms, knowingly, designedly, fraudulently, unlawfully, falsely and feloniously pretend and represent to the said Royal Milling Company, a corporation, that a certain statement in writing, the same as set out in words and figures in the information, which he, the said Burrell, then and there had and produced, was a true and correct statement of his assets and liabilities at said time, and that said statement was false in this, that the said Burrell therein stated his bills payable amounted to the sum of $6,914.76, which statement was false, and was by said Burrell known to be false, and that said Burrell was then, and for a long time prior thereto including January 1st, 1901, had been, and up to the filing of the information in this case was indebted to various persons in various sums aggregating more than $14,000, and that at the time of giving said statement said Burrell well knew that he was indebted in a sum exceeding $14,000, but falsely and fraudulently concealed his knowledge thereof from said Royal Milling Company, and that said Royal Milling Company believing that such false and fraudulent statement was true, and relying upon the truth of the same, and without any knowledge that the same was not true, did, between the 20th day of March, 1901, and the 20th day of July, 1901, sell and deliver
80 to said defendant goods, wares and merchandise, consisting of flour, cereals and grain, the property of said Royal Milling Company, of the value of about eleven hundred dollars, and extend credit to said Archie Burrell therefor, for which said Burrell has not paid, and that said Royal Milling Company was induced to sell and deliver said goods, wares and merchandise and extend credit to said Burrell by reason of such alleged false and fraudulent pretenses and said alleged false and fraudulent statement, and that the said Burrell made said alleged false and fraudulent pretenses, if he did so make them, for the purpose and with the design of obtaining said goods and merchandise from said Royal Milling Company, with the purpose and design of defrauding said Royal Milling Company of the same, it will be your duty to find the defendant guilty as charged in the information.

If you have a reasonable doubt of the defendant having been proved guilty, as charged in the information, it will be your duty to acquit him.

The court instructs the jury that when a person knowingly and designedly, by false or fraudulent representations, defrauds any other person of property, it is no defense that defendant had no intent to defraud when he obtained goods by false representations, but
81 fully intended to pay for the goods and felt sure of his ability to do so when the bill would become due. (34 Pac. 826.)

The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not de-

prive him of his right to refuse to answer questions tending to criminate him, if he did answer any such question, and an admission made by him in such proceeding is voluntary, and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense when he made such admission, if he did make any such.

The court instructs the jury that the obtaining of property by false pretenses is complete when the property has been obtained by such means, and the offense would not be purged by subsequent restoration or repayment. (34 Pac. 826, 105 Mass. 163.)

You are instructed that if the defendant, before procuring the credit from the Royal Milling Company to himself, and the sale and delivery of goods by said company to him after March 20th, 1901, advised the manager of the Royal Milling Company, the witness W. M. Atkinson of the indebtedness of defendant to his brother Henry Burrell, or the said witness Atkinson had knowledge
82 of the same, you cannot find the defendant guilty as charged in the information, and in that case it would be your duty to acquit him.

Evidence of certain statements of the financial condition of the defendant, furnished by him to one Gold T. Curtis and to the witness Heisey, has been admitted in this case, but you are instructed that those statements have been allowed as evidence in this case for the purpose only of illustrating if they do, the intent that the defendant had when he furnished to the Royal Milling Company the statement alleged to have been furnished said company by him about the 20th of March, 1901, and for no other purpose.

A defendant in a criminal case is permitted, under the law, to take the stand and testify in his own behalf. The jury, in judging his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant and the nature and enormity of the crime of which he is accused.

It is provided by the laws of Montana that every person who, knowingly and designedly, by a false and fraudulent representation or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or
83 mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money so obtained; and, if you find the defendant guilty as charged in the information; you are instructed that the punishment under the laws of Montana for the offense charged in this case is by imprisonment in the State penitentiary for a period of not less than one nor more than fourteen years.

If you find the defendant guilty you have the right to fix his punishment, or you may leave the punishment to be fixed by the court.

If you believe that any witness who has testified in this case has wilfully and intentionally testified falsely as to any material matter in the case, the jury have the right to disregard any or all of the testimony of such witness.

It requires the concurrence of your entire number to make a verdict.

——— ———, *Judge.*

Endorsed: 234 Court's instructions. Filed Oct. 9th, 1901. John T. Athey, clerk.

84 *Instructions to the Jury which are Excepted to.*

To the giving of which said instructions counsel for the defendant excepts as follows:

Defendant excepts to the giving of instruction numbered one, which was in words and figures as follows to-wit:

"1. The court instructs the jury that when a person knowingly and designedly, by false or fraudulent representations defrauds any other person of property, it is no defense that defendant had no intent to defraud when he obtained goods by false representations, but fully intended to pay for the goods and felt sure of his ability to do so when the bill would come due. (34 Pac. 826.)" For the reason that the said instruction does not correctly state the law with reference to the facts in issue in this case.

Defendant excepts to the giving of instruction numbered two, which said instruction was in words and figures as follows to-wit:

"2. The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary, and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense when he made such admission, if he did make any such." For the
85 reason that said instruction invades the province of the jury, in that it directs their attention to the alleged admissions of the defendant and is a charge upon the effect and weight of the evidence. The defendant excepts to the instruction for the further reason that the same does not correctly state the law, in this, that it appears from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the act of Congress, approved July 1st, 1898, which said act provides as follows: Chapter III, section etc. "But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding." And the said instruction is against the law.

Defendant excepts to the giving of the following instruction, to-wit:

"The court instructs the jury that the obtaining of property by false pretenses is complete when the property has been obtained by such means, and the offense would not be purged by subsequent restoration or repayment." For the reason that the said instruction is immaterial and incorrectly states the law applicable to the facts in this case.

Defendant excepts to the giving of the following instruction, to-wit:

"Evidence of certain statements of the financial condition
86 of the defendant, furnished by him to one Gold T. Curtis and to the witness Heisey, has been admitted in this case, but you are instructed that those statements have been allowed as evidence in this case for the purpose only of illustrating, if they do, the intent that the defendant had when he furnished to the Royal Milling Company the statement alleged to have been furnished said company by him about the 20th of March, 1901, and for no other purpose." For the reason that the said statements were improperly admitted in evidence for any purpose, and the jury should have been instructed to disregard them.

Wherefore defendant prays that this bill of exceptions may be signed, sealed and made a part of the records which is done accordingly this 22d day of November, 1901.

J. B. LESLIE, *Judge.*

87 In the District Court of the Eighth Judicial District, State of Montana, in and for the County of Cascade.

STATE OF MONTANA, Plaintiff,
vs.
ARCHIE BURRELL, Defendant.

Order Settling Bill of Exceptions.

Upon application of attorneys for defendant, it is this day ordered that the foregoing bill of exceptions herein on motion for new trial, consisting of 54 pages, be and the same is hereby allowed and settled as and for the defendant's bill of exceptions on motion for new trial in said cause.

Done this 8th day of May, 1902, as of the 22d day of November, 1901.

J. B. LESLIE, *Judge.*

[Endorsed:] # 1749. Order settling bill of exceptions. Filed May 9", 1902. Henry G. Rickerts, clerk.

88 *Notice of Hearing Bill of Exceptions.*

Title of Court.

Title of Cause.

T- A. C. Gormley, county attorney, and W. G. Downing, attorneys for the plaintiff:

You will please take notice that the defendant will on Saturday, the 26th day of October, 1901, at the court-house in the city of Great Falls, Montana, at ten o'clock a. m. or as soon thereafter as counsel can be heard, present to the Honorable J. B. Leslie, presiding judge of said court, for settlement, his bill of exceptions herein, a copy of the proposed draft of which said bill of exceptions is herewith served.

And if the said judge is not present at that time, the said proposed draft will be delivered to the clerk to be transmitted to the judge.

Dated October 24th, 1901.

J. A. LARGENT AND
CULLEN, DAY & CULLEN,
Attorneys for Defendant.

Service accepted this 24th day of October, 1901.

A. C. GORMLEY,
—— ——,
Attorneys for State.

Endorsed: (Title of court; title of cause.) Bill of exceptions. Filed Oct. 25th, 1901. John T. Athey, clerk, by G. B. Lockhart, deputy.

89 *Order Extending Time to File Amendments to Bill of Exceptions.*

Title of Court.

Title of Cause.

A. C. Gormley, county attorney of Cascade county, Montana, having made an application to this court for an order granting him an extension of ten days in which — file the proposed amendments to defendant's bill of exceptions, and the court being fully advised in the premises, it is hereby ordered that said A. C. Gormley be and he is hereby granted an extension of ten days in which to file the proposed amendments to defendant's bill of exceptions.

J. B. LESLIE, *Judge.*

Done in open court this 3d day of November, A. D. 1901.

Endorsed: Filed Nov. 5th, 1901. John T. Athey, clerk, by G. B. Lockhart, deputy.

90 *Affidavit of S. A. Balliett.*

Title of Court.

Title of Cause.

Affidavit.

STATE OF MONTANA,
County of Lewis & Clarke, } ss:

S. A. Balliett, being duly sworn says as follows: I reside at Helena, Montana; I am referee in bankruptcy in the district of Montana, appointed by the district court of the United States for the district of Montana. I know the defendant herein, Archie Burrell; as such referee in bankruptcy I did on the 16th day of August A. D. 1901, examine the said Archie Burrell, as a bankrupt, pursuant to the provisions of the act of Congress approved July 1, 1898; I am acquainted with the statements alleged to have been made by the

said Archie Burrell to the Royal Milling Company, referred to in the information in this case. The said statement was presented to the said Archie Burrell upon his examination as a bankrupt by Sam Stephenson, Esq., one of the attorneys for the creditors of the said Archie Burrell, and thereupon the said Archie Burrell was examined before me as such referee in bankruptcy touching such statement, and testified as follows:

Q. I will ask you whether or not this is your signature, Mr. Burrell? (Referring to paper.)

A. Yes sir, that is my signature.

91 Q. And for what,—what is this paper?

A. Well it was a statement that Mr. Curtis wanted, to know about how I stood when I was renewing the note.

Q. Isn't this a statement that you gave to the Royal Milling Company?

A. I don't know whether it is or not. I couldn't say.

Q. This is your writing?

A. Yes sir.

Q. Did you give Mr. Curtis more than one statement?

A. Yes sir.

Q. Did you give Mr. Curtis a statement on January 1st, 1901?

A. Well I don't know.

Q. Tell us why it was *was* that the indebtedness due H. A. Burrell, or Henry Burrell, was not included in this statement at that time?

A. Well, as I told you before, I didn't put it in, but I explained it to those people just as I did to Mr. Curtis and Mr. Ewing.

Q. Yet you put nothing in writing to show that you owed Henry Burrell?

A. No sir.

Q. Yet you expected that this statement would be used confidentially by them?

A. No it was not.

92 Q. You didn't expect that they would go and tell that you had given them the statement, or what it was?

A. Well I didn't care about that.

Q. You have sworn however, that you cannot recall at any time that you told any person connected with the Royal Milling Company of that indebtedness to Henry Burrell?

A. I had several talks with Mr.—the manager there, Mr. Atkinson, and I think I explained the matter to him.

Q. You think you explained the matter to him?

A. Yes sir.

Q. You gave this statement to Mr. Atkinson at his request, did you, or did you take it up to him voluntarily?

A. No he asked for a statement two or three times.

Q. Did he explain what he wanted a statement for?

A. No.

Q. You were buying flour from the Royal Milling Company at that time?

A. Yes sir.

Q. And you understood that he wanted a statement to judge as to whether or not he should extend to you credit?

A. Well I suppose that is what it was for, not that I know.

Q. Didn't you tell the Royal Milling Company officials or agents, out at their mill since giving this statement that you had gotten in an even better financial condition than you were in January 1st, last?

93 A. Well I thought I had.

Q. You thought you had?

A. Yes sir.

Q. In this statement you say that your liabilities on the first of January were $6,914.76, was that true?

A. Well it was of that part of it.

Q. Then that was your liabilities exclusive of the liability of Henry Burrell, of the Henry Burrell liability, was it; in other words, you owed other creditors that much money, did you?

A. Yes sir.

Q. And you made no arrangement at that time to have this Henry Burrell indebtedness cancelled, was that true?

A. I had made no arrangements to have it cancelled.

Q. And Henry Burrell had not at any time agreed to cancel it?

A. No sir, not unless it was paid.

Q. So that this statement upon its face was a false statement?

A. It is correct as far as the statement goes.

That the said testimony was taken down in shorthand and afterwards transcribed to longhand and read over by the said Archie Burrell and signed by him and is now on file in my office as such referee that the foregoing is a correct and true copy of the said
94 testimony so far as it relates to said statement, as given by the said Archie Burrell upon the said hearing in bankruptcy. And further deponent say-th not.

S. A. BALLIETT.

Subscribed and sworn to before me this 25th day of October A. D. 1901.

W. E. CULLEN, JR.,
[NOTARIAL SEAL.] *Notary Public in and for Lewis & Clarke County, Montana.*

Filed Nov. 9th. 1901.

JOHN T. ATHEY, *Clerk*,
By G. B. LOCKHART, *Deputy*.

95 *Order Extending Time.*

Title of Court.

Title of Cause.

Upon the application of the county attorney, and the court being fully advised in the premises, it is hereby ordered that the said

county attorney be granted ten days from and after this date to serve and file any proposed amendments to the defendant's bill of exceptions, and also to serve and file any counter-affidavit, and other papers in the matter of defendant's motion in arrest of judgment or motion for a new trial.

J. B. LESLIE, *Judge.*

Done in open court this 12th day of November, A. D. 1901.

Filed Nov. 12th, 1901.

JOHN T. ATHEY, *Clerk,*
By G. B. LOCKHART, *Deputy.*

96 *Order Denying Motion for New Trial and for Arrest of Judgment.*

Title of Court.

Title of Cause.

The motion in arrest of judgment and also the motion for a new trial, made by the defendant herein and filed in this cause, having heretofore come on for hearing, and by agreement of the parties both of said motions were argued and heard at the same time and submitted, and the court being advised,

It is ordered that the motion in arrest of judgment as well as the motion for a new trial be, and the same are, both hereby denied.

Dated Nov. 27, 1901.

J. B. LESLIE, *Judge.*

Filed Nov. 27th, 1901.

JOHN T. ATHEY, *Clerk.*

97 *Commitment to State Penitentiary.*

Title of Court.

September Term, A. D. 1901.

Present: Hon. J. B. Leslie, judge.

THE STATE OF MONTANA *against* ARCHIE BURRELL. } Conviction of Obtaining Property by False Pretenses.

The county attorney, with the defendant and his counsel, J. A. Largent, came into court. The defendant was duly informed by the court of the nature of the information found against him for the crime of obtaining property by false pretenses committed on the 20th day of March, 1901, of his arraignment and plea of not guilty as charged in said information, of his trial and the verdict of the jury on the 9th day of October A. D. 1901, "Guilty as charged in the information," and fix his punishment at one year in the State prison. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none. And no sufficient cause being shown or appearing to the court, thereupon the court renders its

judgment: That whereas the said Archie Burrell having been duly convicted in this court of the crime of obtaining property by false pretenses,

It is therefore ordered, adjudged and decreed, that the said
98 Archie Burrell be punished by imprisonment in the State penitentiary, of the State of Montana, at hard labor, for the term of one (1) year.

The defendant was then remanded to the custody of the sheriff of the county of Cascade, State of Montana, to be delivered by him into the custody of the proper officers of said State penitentiary.

November 29th, 1901.

J. B. LESLIE, *Judge.*

Endorsed: No. 234 (Title of court: title of cause.) Commitment State penitentiary, on plea of not guilty. A. C. Gormley, Esq., county attorney. Bk. 2, page 85.

99 *Notice of Appeal to the Supreme Court.*

Title of Court.

Title of Cause.

To A. C. Gormley, county attorney for Cascade county, and to J. T. Athey, clerk of said court:

You will please take notice that Archie Burrell, the defendant in the above entitled cause, hereby appeals to the supreme court of the State of Montana, from the final judgment of conviction made and entered against him in said court on the 29th day of November A. D. 1901, and from the order made and entered in said court in said cause on the 27th day of November A. D. 1901, denying defendant's motion for a new trial, and from each and every part of said judgment or of said order.

J. A. LARGENT &
CULLEN, DAY & CULLEN,
Attorneys for Defendant.

Service of the above notice together with a copy thereof this day received.

A. C. GORMLEY,
County Attorney.

Filed Nov. 29, 1901.

JOHN T. ATHEY, *Clerk.*

100 *Certificate of Probable Cause and Order Staying Proceedings.*

Title of Court.

Title of Cause.

Archie Burrell, the defendant in the above entitled cause, having appealed to the supreme court of the State of Montana from the judgment of conviction heretofore entered in said cause against him on the 29th day of November A. D. 1901, and from an order deny-

ing his motion for a new trial made and entered on the 27th day of November, 1901, I, J. B. Leslie, judge of said district court, do hereby certify that in my opinion there is probable cause for the said appeal, and a stay of proceedings upon the said judgment pending appeal is accordingly ordered.

Done this 29th day of November, 1901.

J. B. LESLIE, *Judge.*

Filed Nov. 30th, 1901.

JOHN T. ATHEY, *Clerk,*
By G. B. LOCKHART, *Deputy.*

101 In the District Court of the Eighth Judicial District, State of Montana, in and for the County of Cascade.

STATE OF MONTANA, Plaintiff,
vs.
ARCHIE BURRELL, Defendant.

STATE OF MONTANA,
County of Cascade, } *ss:*

I, John T. Athey, clerk of the district court of the eighth judicial district, State of Montana, in and for the county of Cascade, do hereby certify that the foregoing is a full, true and correct copy of the judgment roll of the said cause, consisting of the information, pages 1–5; verdict, page 6; instructions to the jury, pages 75–83; bill of exceptions, pages 32–87; judgment, pages 96–7; and of the order fixing time for hearing motion for new trial, page 30; notice of intention to move for new trial, pages 14–29; affidavit used on hearing of motion for nev trial, pages 89–93; order extending time to propose amendments to bill of exceptions, page 94; motion in arrest of judgment and affidavit, pages 7–13; order denying motion for new trial, page 95; notice of appeal, page 98; certificate of probable cause and order staying proceedings, page 99.

Witness my hand and seal of said court this 8th day of May, 1902.

JOHN T. ATHEY,
Clerk of said Court,
[SEAL.] By G. B. LOCKHART,
Deputy Clerk.

102 *Clerk's Certificate.*

In the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade.

THE STATE OF MONTANA, Plaintiff,
vs.
ARCHIE BURRELL, Defendant.

STATE OF MONTANA,
County of Cascade, } *ss:*

I, John T. Athey, clerk of the district court of the eighth judicial district of the State of Montana, in and for the county of Cascade, do

hereby certify that the foregoing is a full and correct copy of all of the papers filed herein, to-wit: The information, verdict, motion in arrest of judgment, notice of intention to move for a new trial, orders of the court, bill of exceptions, commitment, notice of appeal, affidavit of S. A. Balliett, and certificate of probable cause and order staying proceedings.

Witness my hand and the seal of said court this 9th day of December, 1901.

JOHN T. ATHEY,
Clerk of said Court.

[SEAL.]

103 STATE OF MONTANA:

In the Supreme Court, December Term, 1902.

THE STATE OF MONTANA, Plaintiff and Respondent,
vs.
ARCHIE BURRELL, Defendant and Appellant. } No. 1749.

Submitted November 10, 1902; decided December 22, 1902.

Filed December 22, 1902. —— ——, Clerk.

104 Mr. Justice MILBURN delivered the opinion of the court:

The defendant was informed against and charged with the crime of obtaining property by false pretenses, in that he did on the 20th day of March, 1901, falsely, fraudulently and feloniously represent to the Royal Milling Company, a corporation, that a certain statement in writing which he had then and there to the said company produced, was a true and correct statement of his assets and liabilities, whereas the said statement was false in that his liabilities were largely in excess of the amount set forth in such statement, said defendant knowing the same to be false, and that the company was induced to sell and deliver to him certain goods of great value, sold because of said misrepresentations. The defendant was convicted, and the cause is before us on appeal from the judgment and an order denying defendant's motion for a new trial.

Numerous technical objections have been made by the attorney general to the record and transcript as presented. In view of the conclusions we have reached as to other points, it will be unnecessary to consider any of these objections.

105 The only assignments of error seriously relied upon by the defendant and the only ones which we consider it at all necessary to treat, are the following: Upon the cross-examination of W. M. Adkinson, agent of the said company, being the person to whom the alleged false statements were made by the defendant, he was asked the following question: "I will ask you if you have not stated and know it to be a fact that it had been represented to you prior to March 20, 1901, that Archie Burrell, this defendant, was indebted to Henry Burrell?" To which question counsel for the State objected on the ground that it was not in proper form, was immaterial and failed to state "when and where and who was pres-

ent." The question was not in proper form. There are at least two questions involved in the one, and the whole is ambiguous. If the witness had answered in the affirmative, the jury would not have known what he meant. If he had answered "No," his answer would have been pregnant. The court was not in error in sustaining the objection to the question in the form it was put. The witness on direct examination testified that he had heard it "rumored" that the defendant was indebted to his brother, and that at the time of the making of the said written statement he had asked defendant whether he was indebted to his brother and that he then and there explicitly denied that he owed his brother. If the defendant's counsel desired to go further into this matter he had every oppor-
106 tunity to ask another question, or as many as necessary, couched in proper form, and he should have done so, if he desired to search the heart and memory of the witness on cross-examination in respect of the very material matter of whether he was actually deceived by any statement made by Archie Burrell at the time he advanced him credit as set out in the complaint.

Owing to the frequency with which able counsel raise the point, and contend for it in this court, that when on cross-examination a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of time, place, and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If in answer to a question so put he deny that he has made any inconsistent statements, or say that he does not remember—that ends the matter and he cannot be impeached by production of evidence that he has done so, for the reason that a proper foundation for such impeaching evidence has not been laid. (§ 3380, Code Civ. Pro.) Before such evidence may be introduced to contradict him, common justice and ordinary fairness demand that he have his memory aided by such relation of such circumstances and that he be allowed to tell and explain exactly what he did say, if he
107 said anything apparently, or at all, inconsistent at other times. If counsel intend to go further and to bring in evidence of such inconsistent statements, if the witness deny them or says he does not remember, then and only then is it necessary to lay such a foundation. These remarks, of course, are not intended to apply to admissions or declarations of a party as evidence against such party.

The other point relied upon by counsel is that the court erred in giving the following instruction, to-wit: "The court instructs the jury that the fact that the defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or

charged with a criminal offense when he made such admission, if he did make any such." This instruction is objected to for two reasons, first, that if it be correct in law it would be erroneous to give it, for that it is a charge upon the effect and weight of the evidence; and, second, that it is incorrect as a statement of the law, for the reason that the act of Congress to establish a uniform system of bankruptcy, approved July 1, 1898, provides, among other things, that "no testimony given by him (the bankrupt) shall be offered
108 in evidence against him in any criminal proceeding." It appears from an examination of the record that the defendant had been examined in his own bankruptcy proceedings before the referee in bankruptcy, and that during the course of his examination he made certain statements which, it is alleged, were admissions conflicting with his testimony in chief in the criminal case before us. We do not consider that the instruction is open to the objection as being a charge upon the weight of the evidence. The question was squarely before the court as to whether or not admissions made by him in the bankruptcy proceedings could be used in cross-examination of the defendant in the criminal case. If an instruction upon admissions made by the defendant is one wherein the court invades the province of the jury in weighing evidence, then no instruction upon the question of admissions could ever be given to a jury. The only authority cited as in support of this contention is State *vs.* Schnepel, 23 Mont. 523, which we do not consider at all in point. That was a case in which the court held that an instruction calling special attention to the defendant's witnesses and giving special direction as to how their evidence should be weighed, is properly refused as invading the province of the jury. This is a case wherein the question arose whether alleged admissions made by the defendant in the bankruptcy proceedings, and made without any refusal to testify, were voluntary or involuntary, and
109 whether or not they could be inquired about on cross-examination of the defendant in criminal proceedings subsequently commenced; in other words, the court was passing upon the effect of the bankruptcy act in respect of the portion thereof heretofore quoted. A lengthy discussion of this point is not at all necessary. The familiar provision of the Constitution of the United States (article V), that "no person shall be compelled in a criminal case to be a witness against himself" is the one invoked by the defendant. He was not compelled to testify in the criminal case. He made no objection to the questions asked on cross-examination as to the alleged admissions. The position of the defendant in this case is that the bankruptcy act grants the bankrupt immunity from prosecution because of anything testified to by him in the bankruptcy proceedings. This is not so, as was held in the case of Counselman *vs.* Hitchcock, 142 U. S. 547, L. E. 35, page 1110, wherein, considering the inter-state commerce act, the court held that a witness is protected by the constitutional provision from being compelled to disclose the circumstances of his offense or the sources from which, or the means by which, evidence of its commission or of his connection with it

may be obtained or made effectual for his conviction; and that legislation cannot abridge a constitutional privilege, and cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect; and that no statute which
110 leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. The provision in the bankruptcy act, that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, does not prevent sufficient incriminating information and evidence from being obtained from sources other than the bankrupt, the knowledge of such sources having been obtained from his testimony. The bankrupt before the referee had the constitutional right to refuse to testify as to matters tending to incriminate him. He did not do so. He waived his privilege and any admissions made by him in such proceeding before the referee could properly be made a matter of cross-examination, if pertinent, in a criminal proceeding. Besides, as we have said above, the record shows that no objection was offered by the defendant to such cross-examination in the district court. If the bankruptcy act were operative to protect him from disclosing anything in the criminal case, which we do not believe, as we have stated, he should have objected to the cross-examination touching such testimony before the referee. He did not do this. If he had any privilege when upon the stand in his own behalf in the criminal case, he waived it by not refusing to answer.

There is no question before us for decision as to whether,
111 if the bankruptcy act contained a provision exempting a bankrupt from prosecution for crimes appearing from the testimony in any proceedings before a referee in bankruptcy, such provision would exempt him from prosecution for such crimes in a State court or from being examined in a State court as to matters pertinent to such proceedings and disclosed by him in the same, and we do not find it necessary to treat of or consider such a question in this case.

The assignments of error relied upon are not tenable. The judgment and the order denying the motion for a new trial are affirmed.

Affirmed.

GEO. R. MILBURN,
Associate Justice.

We concur:

THEO. BRANTLY,
Chief Justice.

WM. T. PIGOTT,
Associate Justice.

112 In the Supreme Court, State of Montana.

THE STATE OF MONTANA, Respondent,
vs.
ARCHIE BURRELL, Appellant.

MONDAY, *December* 22*nd*, 1902.

This cause this day came on for the judgment and decision of the court. Whereupon, on consideration, it is now here ordered and adjudged that the judgment of the lower court made and entered on the 29th day of November, A. D. 1901, and also the order made and entered on the 27th day of November A. D. 1901, denying defendant's motion for a new trial be and the same are hereby affirmed. Opinion by Mr. Justice Milburn, Mr. Chief Justice Brantly and Mr. Justice Pigott concurring.

113 In the Supreme Court of the State of Montana.

THE STATE OF MONTANA, Plaintiff and Respondent,
vs.
ARCHIE BURRELL, Defendant and Appellant.

Petition for Writ of Error to the Supreme Court of the United States.

To the honorable the judges of the supreme court of the State of Montana:

Comes now the above named defendant and appellant, Archie Burrell, and complains that in the record and proceedings had in said cause, and in the opinion and judgment of this honorable court, rendered on the 22nd day of December, 1902, upon the appeal of this defendant in cause No. 1749 on the docket of this court, manifest error has happened to the great damage of your petitioner in this, to-wit:

a. In holding that the act of Congress to establish a uniform system of bankruptcy, approved July 1st, 1898, does not grant to this defendant, a bankrupt, immunity from prosecution because of facts testified to by him before the referee in said bankruptcy proceedings.

b. In holding that the fact that the said defendant testified
114 in such proceedings before the referee in bankruptcy did not deprive him of his right to refuse to answer questions tending to criminate him, and that admissions made by him in such proceedings were voluntary and competent evidence in a criminal prosecution subsequently inaugurated for crimes growing out of the circumstances testified to by him before said referee.

And your petitioner further shows that in the said cause your petitioner claimed a right, privilege or immunity under the Constitution of the United States, and under the statutes of the United States relating to bankruptcy, and the decision of this court was against the right, privilege or immunity specially set up and claimed by your petitioner as hereinabove set forth.

Wherefore your petitioner now prays for an order allowing him to prosecute a writ of error from the honorable the Supreme Court of the United States to this court under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings of this court be suspended and stayed until the determination of the said writ of error by the honorable the Supreme Court of the United States.

115 And your petitioner as in duty bound will ever pray.

W. E. CULLEN,
E. C. DAY,
W. E. CULLEN, JR.,
Attorneys for Petitioner.

Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause, and in this court be stayed upon the petitioner executing a good and sufficient bond in the sum of $1000.00 *dollars* as required by law.

THEO. BRANTLY,
Chief Justice and Presiding Justice of the Supreme Court of the State of Montana.

Dated December 23d, 1902.

Endorsed: #1749. In the supreme court of the State of Montana. The State of Montana, plaintiff and respondent; *vs.* Archie Burrell, defendant and appellant. Petition for writ of error to the Supreme Court of the United States. Filed: Dec. 24, 1902. Henry G. Rickerts, clerk supreme court, State of Montana.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment on the pleading which is in the said court before you, or some of you, between the said State of Montana, plaintiff and respondent, and Archie Burrell, defendant and appellant, number 1749, a manifest error hath happened to the great damage of the said Archie Burrell as by his petition appears.

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record — proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington in the District of Columbia on the twentieth day of February next in the said Supreme Court to be then and there held. That the record and proceedings

aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right — according to the laws and customs of the United States should be done.

117 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of January, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States,
District of Montana.

Allowed by
THEODORE BRANTLEY,
Chief Justice of the Supreme Court
of the State of Montana.

Copy of the foregoing received and filed this third day of January, 1903.

HENRY G. RICKERTS, *Clerk.*

117½ [Endorsed:] In the supreme court of the State of Montana. The State of Montana, plaintiff and respondent, *vs.* Archie Burrell, defendant and appellant. Original writ of error. Filed Jan. 3rd 1903. Henry G. Rickerts, clerk.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia on the 20th day of February, 1903, pursuant to a writ of error duly issued out of the clerk's office of the supreme court of the State of Montana, wherein Archie Burrell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Theodore Brantly, chief justice, and presiding judge of the supreme court of the State of Montana, this 24th day of December, A. D. 1902.

THEO. BRANTLY,
Chief Justice.

118½ [Endorsed:] In the supreme court of the State of Montana. The State of Montana, plaintiff and respondent, *vs.* Archie Burrell, defendant and appellant. Original citation. Due personal service of the within citation is hereby admitted, and receipt of copy acknowledged this 24th day of December, 1902. James Donovan, attorney general, attorney for State of Montana. Filed Dec. 24, 1902. Henry G. Rickerts, clerk supreme court, State of Montana.

119 *Now* all men by these presents, that we, Archie Burrell, as principal, and the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, as surety, are held and firmly bound unto the State of Montana in the full and just sum of one thousand dollars, to be paid to the said State of Montana, its certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals this twenty-third day of December, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a term of the supreme court of the State of Montana, on the twenty-second day of December, 1902, in a suit pending in said court between The State of Montana, plaintiff and respondent, and Archie Burrell, defendant and appellant, a judgment was rendered against said Archie Burrell, and the said Archie Burrell having obtained from said court a writ of error to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Montana, citing and admonishing it to be and appear at a terms of the United States — Court to be holden at the city of Washington in the District of Columbia on the twentieth day of February next.

Now the condition of the above obligation is such that if the
120 said Archie Burrell shall prosecute his writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

ARCHIE BURRELL,
[SEAL.] By E. C. DAY, *Attorney.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By FRANK BOGART,
Attorney in Fact.

Endorsed: #1749. In the supreme court of the State of Montana. The State of Montana, plaintiff and respondent; *vs.* Archie Burrell, defendant and appellant. Bond on writ of error. Filed Dec. 24, 1902. Henry G. Rickerts, clerk supreme court State of Montana. Form of bond and sufficiency of security approved. Theo. Brantly chief justice.

121 In the Supreme Court of the State of Montana.

STATE OF MONTANA, } *ss:*
County of Lewis & Clarke, }

I, Henry G. Rickerts, clerk of the supreme court of the State of Montana, do hereby certify and return to the honorable the United States Supreme Court that the foregoing volume, consisting of 120 pages, numbered consecutively from 1 to 120, is a true and correct and complete transcript of the records, process, pleadings, orders, and judgment in said cause, and of the whole thereof, as appears

from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error, together with proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Helena, Montana, this 3rd day of February, A. D. 1903.

[Seal Supreme Court, State of Montana.]

HENRY G. RICKERTS, *Clerk.*

Endorsed on cover: File No. 18,835. Montana supreme court. Term No. 218. Archie Burrell, plaintiff in error, *vs.* The State of Montana. Filed February 16, 1903.

FILE COPY. 2034

Office Supreme Court
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JAMES H. McKENNEY,
Cl

No. 218.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error,

vs.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. DAY,

Attorney for Plaintiff in Error.

20341

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error,

vs.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This cause comes into this Court on a writ of error sued out by the plaintiff in error, Archie Burrell, to review a judgment of conviction rendered by the Supreme Court of the State of Montana on the 22nd day of December, 1902.

STATEMENT OF THE CASE.

The plaintiff in error was informed against on the 24th day of September, 1901, in the District Court of the Eighth

Judicial District of the State of Montana, in and for the County of Cascade, of the crime of obtaining property by false pretences, in that as alleged, he the plaintiff in error did on the 20th day of March, A. D. 1901, knowingly, designedly, fraudulently, unlawfully, falsely and feloniously represent to the Royal Milling Company, a corporation, that a certain statement in writing which he had then and there produced, was a true and correct statement of the assets and liabilities of the defendant, whereas, as a matter of fact the said statement was false in that his liabilities aggregated more than Fourteen Thousand Dollars instead of Six thousand nine hundred fourteen and seventy-six-one hundredths Dollars, as stated in said statement, and that in reliance upon said statement the said Royal Milling Company was induced to sell and deliver to the said plaintiff in error, then defendant, certain goods, wares and merchandise (Record page 1).

A trial was had to a jury which resulted in a verdict of guilty as charged in the information, and the punishment fixed at one year in the State prison. Defendant moved in arrest of judgment, and also for a new trial (Record p. 6). The motion for a new trial came on to be heard on a bill of exceptions, and after argument and submission to the court, was by the court on the 27th day of November, 1901, denied (Record p. 43); and thereupon the defendant was sentenced to imprisonment for one year in the State prison (Record p. 43).

From the judgment of conviction and the order denying the motion for a new trial, the plaintiff in error, then defendant, appealed to the Supreme Court of the State of Montana (Record p. 44), assigning as error, among other things, the

action of the court in giving instruction No. 2, which said instruction was in words and figures as follows, to-wit (Record p. 38):

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody, or charged with a criminal offense when he made such admission, if he did make any such," for the reason that said instruction invaded the province of the jury, in that it directed their attention to the alleged admissions of the defendant and was a charge upon the effect and weight of the evidence. The defendant excepted to the instruction for the further reason that the same did not correctly state the law, in this, that it appeared from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the Act of Congress, approved July 1st, 1898, which said act provided as follows: Chapter III, Section 7 etc. "But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding."

The cause was submitted to the Supreme Court of the State of Montana on the 10th day of November, 1902, and on the 22nd day of November, 1902, the said Supreme Court entered its judgment affirming the said judgment appealed from, and accompanied the same by its written opinion (Record pp. 46-48), wherein it held that the said Bankruptcy Act

did not grant the bankrupt immunity from prosecution because of anything testified to by him in the bankruptcy proceeding, and that the defendant had waived his constitutional privilege by failing to object to the cross examination had in the district court with reference to the testimony which he had given before the referee in bankruptcy, and that the said instruction complained of was not erroneous. Whereupon the defendant sued out this writ of error, assigning error as follows (Record page 50.)

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the Act of Congress to establish a uniform system of bankruptcy, approved July 1st, 1898, does not grant to a bankrupt immunity from prosecution because of facts testified to by him before the referee in bankruptcy proceedings.

2. The court erred in holding that the fact that the said defendant testified in such proceedings before the referee in bankruptcy did not deprive him of his right to refuse to answer questions tending to criminate him, and that admissions made by him in such proceedings were voluntary and competent evidence in a criminal prosecution subsequently inaugurated for crimes growing out of the circumstances testified to by him before said referee.

ARGUMENT.

It is apparent from the foregoing statement of the case and the record that the plaintiff in error asserted in the Supreme Court of the State of Montana a privilege or immunity arising under the constitution of the United States and under the statutes of the United States relative to bankruptcy,

and the decision of this court was against the existence of such privilege or immunity specially set up and claimed, and therefore this court has jurisdiction of this cause. The only question in the case then is, did the Supreme Court of the State of Montana err in so holding that the fact that the plaintiff in error had been examined before a referee in bankruptcy did not give to him immunity from prosecution in the State court for any crime growing out of the circumstances about which he was examined. It will be noted that the defendant submitted to the cross-examination in the State court relative to his testimony before the referee in bankruptcy without objection (Record p. 22-31), and error was not assigned in the Supreme Court upon the cross-examination. It was assigned with reference to the giving of the instruction to the effect that the examination before the referee in bankruptcy amounted to a voluntary admission which was competent evidence in a criminal prosecution against the bankrupt.

Prior to the examination of this bankrupt and the institution of these criminal proceedings the Circuit Court of Appeals for the Ninth Circuit of the United States, sitting at San Francisco, on the 14th day of May, 1900, had decided in the case of *Mackel vs. Rochester, 102 Fed., 314, 42 C. C. A., 427*, that a bankrupt could not refuse to answer questions relating to his transactions on the ground that his answers would tend to incriminate him, for the reason that his constitutional privilege against his self-incriminating evidence was protected by the bankruptcy act of 1898, Chapter 3, Section 7, Subdivision 9, which provided that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."

In its opinion the court says: "The bankruptcy act contemplates the equitable distribution of the estate of the bankrupt among his creditors, and that the bankrupt will honestly produce and transfer to the trustee all property belonging to him. The testimony which he may be compelled to give includes any matter within his knowledge which is relevant to the prosecution under investigation and material to its determination. If in giving such testimony he exposes himself to prosecution and penalty, he is within the protection of the statute, and upon any such prosecution is authorized to plead as a bar thereof that under the compulsion of this section he gave the criminating testimony." And in support of this decision the court cites and follows the case of *Brown vs. Walker, 161 U. S., 591.*

The case of *Mackel vs. Rochester* has never been reversed or overruled and stands as the law of the courts of the United States for the Ninth Circuit, with reference to such examinations, in which circuit was situated the State of Montana wherein the alleged crime was committed and the prosecution had. So that at the time of the examination of the bankrupt, and at the time of the trial of this criminal prosecution, it was the law of the circuit that the bankrupt could not decline to answer questions put to him upon his examination upon the ground that his answers might tend to incriminate him, and his submission to the examination was to that extent not voluntary.

The ultimate jurisdiction over questions involving the constitutionality of the United States bankrupt laws rests in the courts of the United States, and such courts having pro-

nounced said law to be constitutional, a defendant who brings himself within its provisions will have a complete defense.

Keene vs. Mould, 16 Ohio, 12.

The decision of the Supreme Court of the United States upon the constitutionality of the legal tender act is of paramount authority, and State courts are bound by whatever construction that court places upon the law.

Black vs. Lusk, 69 Ill., 70.
Barringer vs. Fisher, 45 Miss., 200.
Kellogg vs. Page, 44 Vt., 356.

It is a rule too well settled to require the citation of many authorities to support it that the state court is bound to follow the decisions of the Supreme Court of the United States as to whether an act of Congress is constitutional or not. In addition to the authorities cited above, reference may be made to

Hicks vs. Hotchkiss, 7 Johns Ch., 297.
Burwell vs. Burgess, 32 Grat., 472.
Ex Parte Bushnell, 9 Ohio St., 77.
Mooney vs. Hinds, 160 Mass., 469.
State vs. Sioux City, O. & W. R. Co., 46 Neb., 682.

The decision of the Circuit Court of Appeals, until it was reversed or overruled, was entitled to the same credit and force and effect in the courts in the State of Montana as the decision of the Supreme Court of the United States. Consequently when it appeared in the State court that the defendant, now plaintiff in error, had been examined before the referee in bankruptcy touching the matters out of which grew the transaction complained against in the criminal proceeding,

it was the duty of the state court to have dismissed the proceeding. The trial court and the Supreme Court of the state seem to have proceeded upon the theory that the defendant by failing to object to the use on cross-examination of the testimony taken before the referee thereby waived his constitutional privilege and the immunity given him by the bankrupt act, and that admissions made by him before the referee in bankruptcy stood upon the same plane as admissions made out of court (See opinion, Record p. 49.) But the immunity given by the bankruptcy act, if any, goes further than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy. It goes, and must go, if it is to secure to him his constitutional privilege, to the extent of protecting him from prosecution for any crime growing out of the transaction about which he has been examined.

Brown vs. Walker, 161 U. S., 591.
Mackel vs. Rochester, 102 Fed., 314.

This then was a jurisdictional question touching the right of the state court to prosecute him for offenses growing out of these transactions, and being jurisdictional in its character could be raised at any time, even after conviction and sentence. It was contended by counsel for the state that the immunity granted by the act extended only to prosecutions by the Federal government. That question, however, has been decided by this court in the case of *Brown vs. Walker*, *supra*, in which it was held that Federal statutes made in pursuance of the constitution and laws of the United States, are the supreme law of the land, and that the immunity granted by the acts of Congress must extend to any transaction, matter or thing

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concerning which the witness may testify, and must be applicable whenever and in whatever court the prosecution may be had. The constitutionality of the bankruptcy act was not an open question in the state courts, and it was the duty of the state court to grant to such bankrupt the full privilege and immunity to which the Federal courts had held him to be entitled. Having failed to so grant such immunity, we submit that the Supreme Court of the State of Montana was in error and that the judgment should be reversed and the cause remanded.

Respectfully submitted,

E. C. DAY,

Attorney for Plaintiff in Error.

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FILED
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No. 218.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error.

v.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JAMES DONOVAN,
Attorney General of the State of Montana,
and Attorney for Defendant in Error.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1903.

ARCHIE BURRELL,

Plaintiff in Error.

v.

THE STATE OF MONTANA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

There is but one question involved in this case, although it may be treated as having three phases:

1. Does Section 7 of Chapter III of the Bankruptcy Act grant an immunity from prosecution for the offense to which the testimony which may be given by the bankrupt relates, which is as broad as the constitutional immunity

that "no person shall be compelled in a criminal case to be a witness against himself?"

2. If so, is said section applicable to prosecutions and proceedings in the Courts of the State of Montana?

3. And if so, was the privilege and immunity waived by the plaintiff in error when, as defendant in the State Court, he failed to object to the cross examination and to refuse to answer the questions?

I.

Section 7 of the Bankruptcy Act provides as follows:

"The Bankrupt shall when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

Section 860 of the U. S. Revised Statutes, provides:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceedings in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for

perjury committed in discovering or testifying as aforesaid."

The Federal Court of the Ninth Circuit in the case of Mackel v. Rochester, 102 Fed. 315, construing the two provisions of the laws of Congress together, decided that the two provisions furnished absolute immunity from punishment to a bankrupt for any offense concerning which he may testify at his examination in bankruptcy. And it is upon this case that the attorneys for plaintiff in error rely.

We submit that the learned Federal Court did not find any justification for the decision in the language of the Bankrupt Act, but that it must have based its decision wholly upon the provisions of Section 860, and we admit that this decision would be high authority if it were not that this same Section 860 has been construed by the Supreme Court of the United States in the case of Counselman v. Hitchcock. In this case the Supreme Court held that as this provision would not prevent the use of the testimony so obtained to search out other testimony to be used against the witness, the protection afforded is not co-extensive with that of the Fifth Amendment and hence a witness in any criminal investigation in the federal courts may still refuse to answer on the ground that his testimony will tend to criminate him; that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege afforded by the constitution," (Art. V. Am.) and that the immunity from prosecution must be absolute.

Counselman v. Hitchcock, 142 U. S. 547.

The language of the proviso in question is as follows: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." It needs no argument to show that this proviso is entirely too narrow and restricted in its application to future criminal prosecutions to make it available to the bankrupt as a bar to a prosecution for any offense which his testimony might disclose. The only immunity granted is that of his *own* testimony shall not be used against him in any criminal proceeding. To this extent it is neither a greater or a less immunity than that granted by Section V of the Amendments *supra*. But is is not provided that there shall be no prosecution for such offense, and it would quite possible that a conviction could be secured without using his own testimony against him; while at the same time, it might have been impossible for the conviction to have been obtained, or the prosecution instituted in the first instance, but for the information furnished by the very testimony which he has been compelled to give.

In the case last above cited the Court had under consideration a statute which provided that the testimony of the witness should not be given in evidence against him in any criminal proceeding, *"or in any manner used against him, or his property or estate."*

In commenting upon the statute above referred to, this Court said: "It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evi-

dence or used against him or his property in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This of course protected him against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding before such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Counselman v. Hitchcock, 142 U. S. 564.

Continuing the Court says: "It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

Ibid. p. 565.

As above stated, the language of the Bankruptcy Act is not broad enough to exempt the bankrupt from prosecution for offenses about which he may testify; it does not provide that the *facts* about which he may testify shall

never be made the basis of any criminal prosecution. These facts may be proved by other witnesses whose existence would be disclosed by the bankrupt's testimony, in which case the bankrupt's so-called immunity from prosecution under the Bankrupt law would be but a sorry substitute for the absolute immunity granted him by the Constitution from being compelled to be a witness against himself.

On the other hand, to attempt to give the proviso the effect of absolutely barring future prosecution for the offense to which the bankrupt's testimony relates, would not only do violence to the English language as employed in the Section under consideration, but would lead to most confusing complications. Indeed, it is conceivable that the Bankruptcy Law under such a construction could be made the means of criminals securing immunity from prosecution for past offenses by testifying regarding such offenses in bankruptcy proceedings.

The case of Counselman v. Hitchcock is a leading case upon this subject, and is decisive. It is quoted with approval in the case of Brown v. Walker, 161 U. S. 591, cited by plaintiff in error, and in numerous Federal decisions quoted below.

The case of Brown v. Walker construed a statute much broader than either the provision of the Bankruptcy Act, or that of Sec. 860, and this statute was only sustained by an almost equally divided court, four of the most distinguished members of the court entering an emphatic dissent from the majority decision.

Counsel for the State concede that the case of Mackel

v. Rochester *supra* tends to sustain the position of the attorneys for plaintiff in error. But we also contend that the language upon which reliance is placed is a mere dictum of the court; that it is clearly against the well considered decision of the Supreme Court in the case of Counselman v. Hitchcock, and against the great weight of Federal authority.

See Editorial note to Mackel v. Rochester, 4 Am. Bank. Rep. page 1, and cases therein cited.

In re Scott, 1 Am. Bank. Rep. 49.

In re Hathorn, 2 Ibid. 298.

In re Rosser, 2 Ibid. 755.

In re Feldstein, 4 Ibid. 321.

In re Walsh, 4 Ibid. 693.

"It has been urged that the clause that the evidence given shall not be used in a crimnial proceeding protects the bankrupt. I am of the opinion that this clause is not sufficient. It is not as strong a protection as the clause considered by the Supreme Court in Counselman v. Hitchcock, 142 U. S. 547, which was held sufficient. My appreciation of that decision and of Brown v. Walker, 161 U. S. 591, is that a clause of that character, to be constitutional, must operate as a complete pardon for the offense. It must be a statute absolutely securing immunity from prosecution. The clause of Sec. 7 provides that the testimony shall not be used in evidence. This is insufficient to operate as a pardon for the offense, and hence cannot be considered sufficient to overcome the constitutional provision."

In re Hathorn, 2 Am. Bank. Rep. 298.

II.

As to whether or not the provision of the Bankruptcy Act referred to above can have effect upon the courts of the State of Montana, or be applicable thereto, or whether or not Congress has any power to say what shall be or what shall not be evidence in a State Court, we submit that the great weight of authority is to the effect that Congress has no such power.

The only case we find sustaining such power in Congress at all is the case of Brown v. Walker *supra*. But when this case is closely read we find that the court is somewhat in doubt upon this point, and really decides the question upon another ground, to-wit, that the liability of prosecution in a State court for an offense testified about in a Federal examination is too remote a proposition to be considered.

But we respectfully call the attention of the Court to the dissenting opinion in the case of Brown v. Walker, as follows:

"It is beyond the power of Congress to give any person immunity from prosecution in the Courts of a State for an offense against the State, though that offense be disclosed by self incriminating testimony, which such person has been required under an act of Congress, to give in a tribunal of the United States."

Also:

"As the provision of the Constitution of the United States which protects witnesses from self incrimniation can not be invoked in a State court, so neither can the Congres-

sional substitute therefor."

The Court's attention is also directed to the language of Chief Justice Marshall in Barron v. Mayor, 7 Pet. 247, also cited at length in the dissenting opinion in Brown v. Walker.

But whatever the decisions of the Federal courts may be upon this point, the State courts have uniformly held against the power of Congres to pass any such a law and to make it binding upon the State Courts.

In the case of Bowlin v. Comonwealth, 92 Am. Dec. 468, the Supreme Court of Kentucky have held as follows:

"A state may regulate her domestic concerns and prescribe remedies including rules of evidence in her courts, except when prohibited by her own constitution or that of the United States."

Also:

"That Congress has no power to repeal or modify the law of the State of Kentucky on the subject of Negro testimony."

In Knox v. Rossi, 48 L. R. A. 305, it is decided that Congress has no power to declare that a written instrument, unless stamped, shall not be received in evidence in a State Court.

See also:

Notes to above case.

Thomas v. State, 46 L. R. A. 481 and notes.

Small v. Slocum, 37 S. E. and numerous cases cited therein.

Clemens v. Conrad, 19 Mich. 170.

Sammons v. Halloway, 21 Mich. 162.

People v. Gates, 43 N. Y. 40.

Moore v. Moore, 47 N. Y. 467.

Moore v. Quirk, 105 Mass. 49.

III.

It is true that it appears from the transcript (p. 27) that the defendant was examined by the Referee in Bankruptcy, and that the testimony taken before said Referee was used by "counsel for the State reading from the testimony produced and left with him by the Referee in Bankruptcy," and interrogating the witness with the aid of such testimony. Nowhere does there appear any objection interposed by counsel for the defendant to the questions asked by the county attorney or to the use of such testimony. The defendant must, therefore be deemed to have waived all such objections by failing to make them at the proper time, and the State Supreme Court so held.

State v. Burrel, 27 Mont. 282.

"If he had any privilege when upon the stand in his own behalf in the criminal case, he waived it by not refusing to answer." (Tr. p. 49.)

An objection to the reception of evidence cannot be raised for the first time on appeal.

Griswold v. Boley, 1 Mont. 553.

Stafford v. Hornbuckle, 3 Mont. 488.

Rutherford v. Talent, 6 Mont. 134.

Bass v. Buker, 6 Mont. 447.

Brand v. Servoss, 11 Mont. 87.

Merchants' Nat. Bank v. Greenhood, 16 Mont. 458.

It is respectfully submitted that the record herein discloses no error on the part of the Supreme Court of the State of Montana in affirming the judgment of the District Court, and that the judgment of said Supreme Court and of said District Court should be affirmed.

JAMES DONOVAN,

Attorney General of the State of Montana,

and Attorney for Defendant in Error.

Supreme Court of the United States.

No. 218.—October Term, 1903.

Archie Burrell, Plaintiff in Error, vs. The State of Montana. } In error to the Supreme Court of the State of Montana.

[May 31, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

Plaintiff in error was convicted upon information filed in the District Court of the Eighth Judicial District of the State of Montana of the crime of obtaining money under false pretenses. The judgment of conviction was affirmed by the Supreme Court of the State. (27 Mont. 282.)

The false pretenses consisted of a false statement in writing made to the Royal Milling Company, a corporation, concerning his assets and liabilities, whereby he induced the company to sell him goods of great value.

Plaintiff in error testified in his own behalf, and during the cross-examination he was questioned in regard to statements made by him in testimony made before the referee in bankruptcy in his own proceedings. No objection was made.

In view of the examination the trial court instructed the jury as follows:

"The court instructs the jury that the fact that defendant testified in an insolvency proceeding in obedience to a citation did not deprive him of his right to refuse to answer questions tending to criminate him, if he did answer any such questions, and an admission made by him in such proceeding is voluntary and competent evidence in a criminal prosecution subsequently inaugurated, where he was not in custody or charged with a criminal offence when he made such admission, if he did make any such."

Plaintiff in error excepted to the instruction as follows: "For the reason that said instruction invades the province of the jury, in that it directs their attention to the alleged admissions of the defendant and is a charge upon the effect and weight of the evidence. The defendant excepts to the instruction for the further reason that the same does not correctly state the law, in this, that it appears from the testimony that the defendant had testified upon an examination before a referee in bankruptcy, held pursuant to the provisions of the act of Congress, approved July 1, 1898, which said act provides as follows: Chapter III, section, &c. 'But no testimony given by him (upon his examination) shall be offered in evidence against him in any criminal proceeding.' And the said instruction is against the law."

The instruction seems to oppose the provisions of the statute, but the circumstances of the case must be considered. There was no objection made to the introduction of the testimony, and, as we understand the instruction, it was but the expression of the value of the testimony. The contention of plaintiff in error must have been in the trial court as it was in the Supreme Court and is here, to wit, that section 7 of the bankruptcy act grants more than a mere immunity against the admission in evidence of the testimony given before the referee in bankruptcy—that it grants him protection from prosecution for any crime growing out of the transaction about which he was examined; and this necessarily to secure to him the full protection of that clause of the Constitution of the United States which provides that "no person shall be compelled in criminal cases to be a witness against himself." Upon this broad contention he must now rely. A narrower contention might have been yielded to by the State courts. It certainly should have been submitted to them. The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted its probative force cannot be limited. This could not be contended even under the broader provision of the Constitution. A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he was not compellable to give it.

In the case at bar, the court dealt with testimony which had been admitted without question or objection. We are brought, therefore, to the broad and ultimate contention of the plaintiff. We think it is untenable. There is no ambiguity in section seven of the bankrupt act. It requires a bankrupt to submit to an examination concerning his property and affairs, and provides: "But no testimony given by him shall be offered in evidence against him in any criminal proceeding." It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him.

The two things are different, and cannot be confounded. The difference is illustrated by the different constructions this court has given to section 860 of the Revised Statutes and the provisions of the act of Congress of February 11, 1893, c. 83, 27 Stat. 443.

In *Counselman* v. *Hitchcock* (142 U. S. 547) it was contended that the protection of section 860 was that of the Constitution, and it was sought to compel a witness to testify to matters which he claimed would incriminate him. This court held against the contention, and the witness was justified. We did not attempt to extend the section to the prohibition of criminal prosecutions, but confined its immunity to that which was ex-

pressed, to wit, that the testimony given should not "be given in evidence, or in any manner used, against him or his property or estate, in any court of the United States, in any criminal proceeding. . . ."

The act of Feburary 11 was different and the ruling upon it was different. It provided as follows:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them or in any such case or proceeding."

It was held in *Brown* v. *Walker* (161 U. S. 591) that the act was virtually one of "general amnesty," and the protection of the Constitution was "fully accomplished by the statutory immunity." As in *Counselman* v. *Hitchcock* a witness before a grand jury which was investigating alleged violations of the Interstate Commerce Act, claimed that questions addressed to him "would tend to accuse and incriminate him." Upon proceedings in the District Court he was adjudged guilty of contempt and ordered to pay a fine of five dollars and to be taken into custody until he should answer the question. He petitioned the Circuit Court for writ of *habeas corpus*, and from the judgment remanding him to custody prosecuted an appeal to this court. It was held that he was compellable to answer.

In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the bankrupt act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed and now claims exemption from prosecution. For the reasons we have given the claim is untenable.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.